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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER, *Petitioner,*

v.

RICHARD L. ROUDEBUSH, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 515 F.2d 251, and is reproduced in the appendix to the petition for certiorari (Pet. App. 34a-41a).

The opinion of the district court is not officially reported. It is unofficially reported at 7 [CCH] EPD ¶ 9139, and at 7[BNA] F. E. P. Cases 266. The district court's opinion is reproduced in the appendix to the petition for certiorari (Pet. App. 30a-33a).

Also reproduced in the appendix to the petition are the findings and recommended decision of the

hearing examiner (Pet. App. 1a-17a), the decision of the Veterans Administration (Pet. App. 18a-21a), and the decision of the Civil Service Commission (Pet. App. 21a-29a).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. The petition for certiorari was filed on June 19, 1975 and granted on October 6, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether petitioner, who alleged unlawful discrimination in employment by a federal agency in a suit under the 1972 amendments to Title VII of the Civil Rights Act of 1964, was entitled to plenary judicial proceedings in the district court, as opposed to a review of the administrative record?

STATUTE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, provides in pertinent part as follows:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the

> District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> • • •
>
> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.
>
> • • •

STATEMENT

Petitioner, Jewell D. Chandler, is a black female employee of the Veterans Administration. In 1972 Ms. Chandler applied for a GS-13 Supervisory Claims Examiner (Section Chief) position in the Division

of the Los Angeles Region in which she was employed. As of October 1972, there were 16 positions above the GS-12 level in that Division, of which two were held by white females, and fourteen were held by non-black males. Of all Division employees, 38 percent were female and 25 percent were black. (A.R. 18-19; Pet. App. 3a-4a).[1]

Petitioner was designated as "highly qualified" for the position in question, and was referred, with other candidates, to the selecting official for his consideration. A non-black male was selected for the position. (A.R. 19-21; Pet. App. 4a-5a).

Petitioner then filed a timely administrative complaint pursuant to 42 U.S.C. § 2000e-16(a) and 5 C.F.R. § 713.214, alleging, *inter alia,* that her non-selection for the position in question was due to unlawful discrimination on the basis of her race (black) and sex (female). (A.R. 269-276). Petitioner subsequently requested a hearing on her complaint.[2] An administrative

[1] Pursuant to Rule 36(4), the deferred appendix procedure is being utilized in this case. (Stipulation, Oct. 21, 1975). Citations herein are to the original record.

The record consists of four separately paginated volumes plus one paginated exhibit volume. Volume 1 contains the pleadings, orders, etc., in the district court and the court of appeals, and is cited as 'R. ——'. Volumes 2-4 consist of the transcripts of three motion hearings in the district court, and are cited as, *e.g.*, 'Tr. ——, Oct. 29, 1973'.

The certified administrative record of proceedings before the Veterans Administration and the Civil Service Commission constitutes the exhibit volume, and is cited as 'A.R. ——'. This exhibit was part of the record before the lower courts. (R. 121-2).

Portions of the record which are reproduced in the appendix to the petition for certiorari are also cited as 'Pet. App. ——'.

[2] Such a hearing is not required, but is available at the complainant's option. 5 C.F.R. § 713.217(b).

hearing was accordingly held, at which Ms. Chandler, who is not an attorney, represented herself. The hearing examiner refused to call 15 of the 24 witnesses whom petitioner had requested, including the individual who had been selected over petitioner for the job in question. (A.R. 118, 140-145). After the hearing, the examiner submitted findings and recommendations pursuant to 5 C.F.R. § 713.218(g), to the effect that petitioner had not been discriminated against on the basis of her race with respect to the non-selection in question, but that she *had* been discriminated against on the basis of her sex. In light of the finding of sex discrimination, the examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (A.R. 16-35; Pet. App. 1a-17a).

Upon receipt of the hearing examiner's findings and recommended decision, a final decision was issued by the Veterans Administration. This decision rejected the examiner's finding of sex discrimination, accepted the finding of no race discrimination, and accordingly granted no relief. (A.R. 36-9; Pet. App. 18a-21a). Petitioner then filed a timely appeal to the Civil Service Commission. (A.R. 13-15).[3] The Commission affirmed the Veterans Administration's decision. (A. R. 3-8; Pet. App. 21a-29a). Petitioner then filed this suit pursuant to subsection 717(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c). (R. 1-7).

[3] Such an appeal is not required, but is available at the complainant's option. 5 C.F.R. §§ 713.221(d), 713.231(a).

In the district court, petitioner first moved for summary judgment on the ground that the official who entered the Veterans Administration decision rejecting the hearing examiner's decision in petitioner's favor was, as a technical matter of delegation of authority, without authority to act in the matter. (R. 17-30). This motion was denied. (R. 143-4). Petitioner then promptly initiated discovery, filing notice of two depositions and a request for production of documents. (R. 146-150). The respondents moved for a protective order prohibiting the discovery, on the ground that discovery was impermissible because the judicial proceedings should be limited to a review of the administrative record. (R. 151-7). Petitioner opposed the motion for a protective order, asserting her right to discovery and to a plenary judicial trial *de novo*. (R. 158-171).

In order to avoid deciding the issues presented in a piecemeal fashion, the district court determined that it would hold the question of discovery in abeyance pending (1) the filing of cross-motions for summary judgment on the basis of the administrative record, and (2) a determination by the court of the proper scope of the judicial proceedings. (Tr. 3-10, Nov. 26, 1973). Pursuant to the court's request, the parties then filed cross-motions for summary judgment on the basis of the administrative record. (R. 172-180; R. 181-194). It was clearly understood by the parties and the district court that petitioner's cross-motion for summary judgment was filed without prejudice to her position that she had a right to discovery and a trial *de novo*. (Tr. 3-10, Nov. 26, 1973).

After the cross-motions for summary judgment were filed, the district court granted respondents' mo-

tion for summary judgment on the basis of the administrative record, without any pre-trial discovery and without any judicial evidentiary proceedings. The district court adopted the legal position of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975), concerning the nature and scope of judicial proceedings in Title VII cases against federal defendants. It then found "that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief." Apart from thus paraphasing the *Hackley* district court's standard for granting summary judgment in the government's favor on the basis of the administrative record, the opinion of the district court in the case at bar did not explain or state any reasons for its finding against petitioner. (R. 252-9; Pet. App. 30a-33a).

The court of appeals affirmed the district court's denial of petitioner's motion for summary judgment on the ground of improper delegation of reviewing authority, and affirmed the district court's denial of petitioner's cross-motion for summary judgment on the administrative record. (515 F.2d at 253-4; Pet. App. 36a-38a). The petition for certiorari did not seek review of these holdings. (Pet. 6).

The court of appeals also affirmed the district court's grant of summary judgment in respondents' favor on the basis of the administrative record and its denial of a plenary judicial trial *de novo*. (515 F.2d at 254-5; Pet. App. 38a-41a). This is the issue on which certiorari was sought and granted. (Pet. 6). The court of appeals held that the district court correctly "adopted and applied the intermediate scope of in-

quiry expounded in *Hackley* v. *Johnson* [*supra*]," and that summary judgment in the government's favor was appropriate on the basis of the administrative record. (515 F.2d at 254-5; Pet. App. 38a-41a). In ruling that petitioner was not entitled to a trial *de novo* as a matter of right, the court of appeals held that a federal sector Title VII plaintiff must make a showing of necessity in his or her particular case before supplementation of the administrative record or a trial *de novo* is considered. The court then concluded that petitioner had not made such a showing of necessity. (515 F.2d at 255; Pet. App. 40a-41a).[4]

SUMMARY OF ARGUMENT

Civil actions under Title VII against federal government defendants should be adjudicated pursuant to the same procedures that are utilized in all other civil actions under Title VII. These procedures include discovery pursuant to the Federal Rules of Civil Procedure, and a plenary judicial trial. The courts below followed an erroneous procedure in granting summary judgment against petitioner pursuant to a review of the administrative record.

A. It is settled that Title VII actions against private sector defendants are plenary judicial proceed-

[4] This conclusion by the court of appeals ignored the fact that petitioner had attempted to conduct discovery and had presented reasons why the discovery requested was necessary. In addition, while the court of appeals' opinion implies that petitioner was somehow remiss in her obligation to apprise the district court of the reasons why supplementation of the record or a trial *de novo* was necessary, in fact petitioner made her position and the reasons for it quite clear, and the procedure by which the issues were presented to the district court was the procedure which the district court itself requested. (R. 146-150, 158-171; Tr. 3-10, Nov. 26, 1973).

ings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). The question in this case, therefore, is whether a double standard is to be applied which places the federal government in a favored position in comparison to other Title VII defendants. Such a double standard would be incompatible with the central purpose of the 1972 amendments extending Title VII's coverage to the federal sector. That purpose was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 417 U.S. 535, 546-7 (1974).

Unless plenary judicial proceedings are provided in federal sector Title VII cases, the effectiveness of the 1972 amendments will be drastically impaired. The substantive Title VII law developed in private sector cases is now to be applied to the federal government. *Morton* v. *Mancari, supra,* 417 U.S. at 547. Plenary judicial proceedings are essential to the accomplishment of this objective, because under Title VII the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. The reasoning of the Court in the *Alexander* case is fully applicable by analogy in the case at bar.

B. 1. The plain language of amended Title VII provides for the same plenary judicial proceedings in federal sector cases as in all other cases. The statutory structure is unitary and interrelated; the section of the statute which creates and describes a civil action in

the federal sector is expressly cross-referenced to the provisions which govern private sector cases. It is settled that those latter provisions require plenary judicial proceedings.

2. Petitioner's analysis of the statutory language is buttressed by a review of the various stages in the administrative enforcement procedure at which a civil action may be filed. In some of the circumstances where the judicial process may be invoked, such as when no administrative record has been timely compiled, plenary judicial proceedings are obviously required. Yet the statute in no way distinguishes this circumstance from others. Nor does the statute distinguish cases in which an administrative evidentiary hearing has been held from those in which there has been no such hearing. Since no distinctions are made between significantly different circumstances, the judicial procedures contemplated must be the same in all cases, namely, those which are available in any plenary civil action. Moreover, since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted. The courts may not engraft restrictions onto Title VII which the statute itself does not impose. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 798-9.

C. The legislative history of amended Title VII compels the conclusion that federal sector cases are to be adjudicated in the same manner as all other cases. The purpose of the 1972 amendments was to grant the same treatment in the courts to all Title VII litigants, in the private sector, the state and local government sector, and the federal sector.

1. The federal sector 1972 amendments were intended to rectify a situation in which enforcement of equal employment opportunity in the federal government was dependent upon an administrative procedure that had impeded rather than advanced the goal of eliminating discrimination. The congressionally mandated recourse for the federal sector complainant who is dissatisfied with the result obtained in the administrative process is a plenary civil action in district court. Some of the draft legislation considered in the 92d Congress provided for an administrative cease and desist procedure and court of appeals review on the administrative record in the private sector, and this was a major source of controversy. However, in these drafts, which also extended Title VII's coverage to the federal government, federal sector cases were always governed by the section of the proposed statute providing for a civil action in district court; they were never governed by the section providing for a review on the record in the court of appeals. In the statute as enacted, cease and desist and court of appeals review were dropped in the private sector, and all cases were governed by the plenary civil action provisions that governed federal sector cases in the antecedent draft legislation.

2. The unitary structure of the finally enacted legislation fully implements the basic congressional purpose with respect to the federal sector: to provide the same rights and remedies to federal employees and applicants as were provided in the private sector. The authoritative statements of legislative intent emphasize the concept of equality of treatment in all sectors of the economy, and among all plaintiffs and all defendants. The relevant House and Senate Committee

reports, and numerous statements of Senator Dominick (who played a pivotal role in the evolution of the statute as enacted), are especially authoritative. The controversy over certain remarks of Senator Cranston and Senator Williams is not of controlling significance in view of the clear thrust of the legislative history taken as a whole.

3. The congressional intent to afford plenary judicial proceedings in federal sector cases is in no way inconsistent with the simultaneous determination to retain the Civil Service Commission, rather than the Equal Employment Opportunity Commission, as the administrative agency with authority in the federal sector. The federal sector civil action in district court was intended to provide a judicial check on the pro-defendant bias of the CSC, just as the private sector civil action would provide a judicial check on the pro-plaintiff bias of the EEOC. In both sectors, the district court's authority is exerted through a *de novo* judicial proceeding. The plenary civil action in the federal sector is also consistent with the purpose of maintaining the mechanism for possible internal complaint resolution and possible agency self-correction which the administrative procedure provides.

D. The decisions of the lower courts which have considered the issue in the case at bar fall into three basic categories. The Third, Seventh and District of Columbia Circuits have ruled in favor of petitioner's position that federal sector Title VII cases are to be conducted as plenary judicial proceedings. The Tenth Circuit has held that the judicial function in federal sector Title VII cases is strictly limited to a review of the administrative record pursuant to a

"substantial evidence" standard. The Eighth and Ninth Circuits have adopted a hybrid approach, pursuant to which the plaintiff must make a showing of necessity to justify any effort to go beyond the administrative record. The decisions of the courts which have held in favor of plenary judicial proceedings are far more persuasively reasoned than the decisions to the contrary. *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975); *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247; *Caro* v. *Schultz,* 521 F.2d 1084 (7th Cir. 1975).

E. The only rule which is consistent with the language and legislative history of the 1972 amendments is one which provides for plenary judicial proceedings. This case does not present a policy issue for the Court's review, because the policy decision has already been made by Congress. But even if this were not so, sound policy considerations would also counsel in favor of the rule which petitioner advocates.

Any rule which fails to recognize the right to plenary judicial proceedings would drastically impair the effectiveness of the 1972 amendments by making judicial deference to agency and CSC decisions the easy path of least resistance. Moreover, federal sector plaintiffs would be placed at a unique and wholly unjustified disadvantage if they were required to make an affirmative showing persuading the district court that there is a "need" before they could exercise procedures routinely accorded to other civil litigants.

A double standard providing for a restrictive approach only in federal sector cases is not justified by considerations of judicial economy. Whatever view one takes as to the efficacy of the CSC-designed adminis-

trative process, it is not—and is not intended to be—either the equivalent or an approximation of an adversary judicial proceeding. Title VII's judicial remedy would be of dubious value if it did not include the right to conduct discovery and have the court evaluate the credibility of witnesses by observing their testimony.

In federal sector Title VII cases as in any civil litigation, the district courts may take informal steps to avoid unnecessary duplication of evidence which is already of record. The administrative record is admissible in the district court, subject to the limitations of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. But it is admissible only for whatever light it, as one item of evidence, sheds on the facts at issue. It cannot justly be utilized as a weapon for limiting the scope of otherwise proper discovery or for impairing the plaintiff's access to the normal mechanisms of judicial factfinding. To focus the attention of the parties and the court on the administrative record by limiting the scope of judicial proceedings would have the same stultifying effect as a regime of "deferral", which this Court has specifically rejected in the private sector. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 55-9.

F. The issue in the case at bar has important implications for other issues. Foremost among these is the question of the availability of class actions in federal sector cases. Any rule providing for less than plenary judicial proceedings would raise very serious questions as to the applicability of private sector class action law in the federal sector. Such a result would be inconsistent with Title VII's broad remedial pur-

pose, and contrary to the express will of Congress. *See, Albemarle Paper Co.* v. *Moody,* 95 S.Ct. 2362, 2370 n.8 (1975).

G. In the case at bar, petitioner was deprived of the right to conduct any discovery and the right to present any testimonial evidence to the district court as trier of fact. A reversal of the judgment below follows as a matter of course if petitioner had the right to plenary judicial proceedings. Moreover, even if the Court were to adopt an approach requiring a showing of necessity to go beyond the administrative record, the judgment in the case at bar should still be reversed. The courts below ignored crucial deficiencies in the administrative record in holding that there was no need for discovery and judicial evidentiary proceedings in the case at bar.

ARGUMENT

I.

PETITIONER WAS ENTITLED TO HAVE THIS TITLE VII ACTION AGAINST FEDERAL AGENCY DEFENDANTS ADJUDICATED PURSUANT TO THE SAME PROCEDURES, INCLUDING DISCOVERY AND A PLENARY JUDICIAL TRIAL, AS ARE APPLICABLE TO TITLE VII ACTIONS AGAINST ALL OTHER KINDS OF DEFENDANTS; AND THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS PURSUANT TO A REVIEW OF THE ADMINISTRATIVE RECORD.

A. In Context the Issue Is Whether the 1972 Amendments to Title VII Are to Be Impaired by the Application of a Double Standard Favoring Federal Defendants Over All Other Defendants.

If the defendant in the case at bar were a private company rather than a federal agency, and the court of appeals had held that plenary judicial proceedings were not a matter of right and that the district court could, in its discretion, simply review the record of administrative or arbitral proceedings, then the decision below would be plainly inconsistent with the decisions of this Court. For it is settled that Title VII actions against private sector defendants are *de novo* judicial proceedings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). Under the 1972 extension of Title VII's coverage, this is clearly the law not only with respect to private companies, unions and employment agencies, but with respect to state, county, and municipal governments as well.[5]

This case therefore raises the fundamental question of whether the federal government is to be subjected

[5] *See,* 42 U.S.C. §§2000e(a), 2000e-5(f)-(k).

to different and less demanding legal standards and procedures under Title VII than those to which all other classes of defendants are subjected. It seems obvious that a legislative intention to enshrine such a double standard could be inferred only from the most compelling evidence. *Compare, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 89-91 (1973). As is shown in Arguments I(B) and I(C), *infra,* the language and legislative history of the 1972 amendments provide no support for any such inference. On the contrary, the central purpose of the federal sector 1972 amendments was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 417 U.S. 535, 546-7 (1974). This purpose was informed by the ideal of fundamental fairness in the exercise of the power and authority of the federal government. "Equality is the touchstone of a democratic government, and Congress in 1972 finally perceived the injustice and hypocrisy of a system that demanded more from private employers than it was willing to give itself. . . ." *Hackley* v. *Roudebush,* 520 F.2d 108, 136 (D.C. Cir. 1975).

The effectiveness of the 1972 federal sector amendments largely depends upon the proper resolution of the issue which this case presents. As this Court has recognized, in Title VII actions the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. For that reason, the following recent statements by the Court provide substantial guidance on the issue here presented, even though they are addressed to the question of substantive legal standards rather than to any question of procedure:

". . . the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part. [Footnote omitted.] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal employment. [Citation omitted.] In general, it may be said that *the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.* As stated in the House Report,

" 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. *The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly. . . .*' H.R. Rep. No. 92-238, on H.R. 1746, pp. 24-25 (1971)." *Morton* v. *Mancari, supra,* 417 U.S. at 546-7 (emphasis added).

In addition, the following language of this Court's opinion in *Alexander* v. *Gardner-Denver Co., supra,* is in substantial part applicable by analogy to federal sector Title VII actions such as the case at bar:

"[Title VII] does, however, vest federal courts with plenary power to enforce the statutory requirements. . . .

* * *

". . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. [Citations omitted.] And, in general, submission of a claim to one forum does not preclude a later submission to another.

* * *

"The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions [here substitute 'federal agency or Civil Service Commission decisions'] would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'

* * *

". . . the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

* * *

". . . a [deferral] standard that adequately insured effectuation of Title VII rights in the arbitral [here substitute 'administrative'] forum would tend to make arbitration [here substitute 'the administrative process'] a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

* * *

"The federal court should consider the employee's claim *de novo.* The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 47-8, 56-7, 59-60 (footnotes omitted).

The procedural issue presented in the case at bar should be considered in the context of the established general principles set forth above. The substantive law

developed in private sector Title VII cases is now fully applicable in the federal sector. The procedures followed in adjudicating federal sector cases must, therefore, be attuned to the full effectuation of the substantive rights which are involved. There is no justification for applying a double standard under Title VII and favoring federal agency defendants over all other types of defendants. The anomaly of such a double standard is especially striking in the present context, where the government opposes plenary judicial trials in federal sector Title VII cases, while the Solicitor General has successfully argued to this Court that a private sector plaintiff must receive a plenary judicial trial *de novo* regardless of prior adverse administrative and arbitral determinations.[6]

The decision below sanctions a procedure for adjudicating federal sector Title VII cases that is wholly at odds with the procedure that is applicable in the private sector. Yet, in the federal sector no less than in the private sector, it cannot be gainsaid that "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminary employment claims. It is the duty of the courts to assure the full availability of this forum."

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[6] Brief for the United States as Amicus Curiae, *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, October Term, 1973. Similarly, the government takes the position that class actions and class-wide relief are unavailable as a matter of law in federal sector Title VII cases (*e.g.*, Brief for Appellees, at pp. 49-64, *Swain* v. *Calloway*, 5th Cir. No. 75-2002), while the Solicitor General has successfully argued to this Court for a diametrically opposite result in the private sector (Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae, at pp. 17-33, *Albemarle Paper Co.* v. *Moody*, Nos. 74-389, 74-428, October Term, 1974).

Alexander v. *Gardner-Denver Co., supra,* 415 U.S. at 60 n.21.

B. The Express Language of Amended Title VII Provides for the Same Plenary Judicial Proceedings in Federal Sector Cases As in All Other Cases.

Prior to March 24, 1972, Title VII of the Civil Rights Act of 1964 did not provide for suits against federal government defendants. Title VII as amended by the Equal Employment Opportunity Act of 1972 now provides a right to file a civil action against federal sector defendants, and explicitly states that the civil action is governed by the same judicial procedures as those which control civil actions against private sector and state and local government defendants. This statutory language and structure is of crucial importance to the issue presented in the case at bar.

1. The Unitary and Interrelated Statutory Structure

The portion of amended Title VII which creates and describes a right to sue federal government defendants —subsection 717(c), 42 U.S.C. § 2000e-16(c)—provides that at certain specified stages in the administrative enforcement procedure (to be discussed *infra*), a complainant

> ". . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706. . . ."

Section 706 is the portion of Title VII which details the procedures to be followed in civil actions against private sector (and state and local government) defendants. In addition, subsection 717(d) of Title VII,

42 U.S.C. § 2000e-16(d), which further describes the judicial procedures that are to control civil actions brought against federal agencies, reads as follows:

> "The provisions of section 706(f) through (k), as applicable, shall govern actions brought hereunder."

As will now be shown, a review of the portions of the statute to which subsections 717(c) and 717(d) are specifically cross-referenced—subsections 706(f) through (k)—provides compelling support for the conclusion that civil actions against federal government defendants are to proceed in the same manner as civil actions against all other kinds of defendants, and are to include a plenary judicial trial of the plaintiff's allegations. All three courts of appeals which have embarked upon a reasoned analysis of the statutory language have arrived at this conclusion. *Sperling* v. *United States,* 515 F.2d 465, 474-7 (3rd Cir. 1975), *pet for cert. pending,* No. 75-247; *Caro* v. *Schultz,* 521 F.2d 1084, 1087-8 (7th Cir. 1975); *Hackley* v. *Roudebush,* 520 F.2d 108, 118-122 (D.C. Cir. 1975). The Third Circuit has justly observed that the statutory language "hardly admits of any other interpretation." *Sperling* v. *United States, supra,* 515 F.2d at 475.

Subsection 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), provides for district court jurisdiction of "actions brought under this title." Subsection 706(f)(4), 42 U.S.C. § 2000e-5(f)(4), provides that when such an action is filed

> "It shall be the duty of the chief judge of the district . . . in which the case is pending immediately to designate a judge in such district *to hear and determine the case.* In the event that no judge in the district is available *to hear and determine the case,* the chief judge . . . shall certify this fact to the chief judge of the circuit . . . who shall then designate a district judge or circuit judge of the circuit *to hear and determine the case.*" (Emphasis added.)

Subsection 706(f)(5), 42 U.S.C. § 2000e-5(f)(5), goes on to provide that

> "It shall be the duty of the judge designated pursuant to this subsection to *assign the case for hearing* at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not *scheduled the case for trial* within one hundred and twenty days after issue has been joined, that judge *may appoint a master* . . . ." (Emphasis added.)

Subsection 706(g), 42 U.S.C. § 2000e-5(g), which authorizes the awarding of certain types of relief, provides that

> "*If the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate . . . ." (Emphasis added.)

Subsection 706(j), 42 U.S.C. § 2000e-5(j), makes the district court's disposition of the action appealable to the appropriate court of appeals under 28 U.S.C. §§ 1291, 1292. And finally, subsection 706(k), 42 U.S.C. § 2000e-5(k), provides that

> "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and *the United States*

shall be liable for costs the same as a private person." (Emphasis added.)

The language of these sections—which, under subsection 717(d), "shall govern" federal sector civil actions—clearly indicates that the plaintiff in a Title VII action against a federal agency is generally entitled to a plenary judicial proceeding, including discovery and a full evidentiary hearing, regardless of the status of the administrative record. This is, of course, the law with respect to Title VII actions against private sector defendants, which are *de novo* proceedings, regardless of the scope or outcome of prior administrative or arbitral proceedings. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Garnder-Denver Co.,* 415 U.S. 36 (1974).[7]

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[7] It is true, of course, that subsection 717(d) says that subsections 706(f) through (k) 'shall govern "as applicable." But as a review of these subsections makes clear, that phrase merely covers the fact that portions of certain subsections such as those dealing with the Equal Employment Opportunity Commission (EEOC) and the Attorney General—*e.g.,* subsections 706(f)(1), 706(i), 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(i)—are obviously not applicable to actions against the federal government. To read more than this into the phrase "as applicable" would render subsection 717(d) meaningless.

While the government has in the past placed great reliance on the phrase "as applicable" in relation to the present issue, this does not alter the fact that such reliance is, for the reason just stated, wholly lacking in plausibility. For an extended discussion of the "as applicable" argument which the government has advanced in the past, *see, Hackley* v. *Roudebush, supra,* 520 F.2d at 119-122; *see also, id.,* 520 F.2d at 170 (Leventhal, J., concurring).

It is relevant here to note that for more than three years after the effective date of the 1972 amendments, the government took the position that the amendments do not authorize recovery of attorneys' fees by successful plaintiffs in federal sector Title VII cases. This position was based on the "as applicable" argument. The government has, however, now abandoned this position, and has acknowledged that subsection 706(k) is applicable in civil actions under subsection 717(c). This change of position was explained in part as follows: "The application of § 2000e-5(k) to the 1972 amendments requires inferences and implications to be drawn to confer upon it the specificity that the law requires. At the same time, however, I recognize that unless such clearly intended inferences be drawn, the inclusion of subsection 5(k) within the ambit of § 2000e-16(d), might render such inclusion without purpose or effect. These considerations have weighed heavily in my decision." Letter from Acting Assistant Attorney General Irving Jaffe to Senator John V. Tunney, May 6, 1975, published in CCH *Employment Practices Guide,* New Developments ¶ 5327.

2. The Provision of the Same Civil Action in Significantly Different Circumstances

The foregoing analysis is further buttressed by a review of the various stages in the administrative enforcement procedure at which the statute gives the complainant the option to file a civil action. Subsection 717(c) of Title VII, 42 U.S.C. § 2000e-16(c), and the Civil Service Commission's implementing regulations, 5 C.F.R. §§ 713.201, *et seq.,* provide that an employee or applicant for employment who has filed an administrative complaint with his agency may file a civil action in federal district court in any of the following six basic circumstances:

1. if 180 days have elapsed since the filing of the administrative complaint and *the agency has not taken final action on the complaint* (whether or not a hearing has been held); 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.281(b);
2. within 30 days of a *rejection or cancellation of the complaint;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.215;
3. within 30 days of receipt of notice of *final agency action* on the complaint *without a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.-

217(b)(3), 217(c), 221(b)(1), 221(b)(3), 281(a);

4. within 30 days of receipt of notice of *final agency action* on the complaint *following a hearing;* 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.217(b)(2), 221(b)(2), 281(a);

5. if 180 days have elapsed since the filing of an appeal from the final agency action (with or without a hearing) to the Civil Service Commission and *the Commission has not taken final action on the appeal;* 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.231(a), 281(d); or

6. within 30 days of receipt of notice of *final Civil Service Commission action on an appeal* from the final agency action (with or without a hearing); 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.-231(a), 281(c).

It should be noted that even the above categorization is in fact an oversimplification, since circumstances 1, 5 and 6 can be subdivided into two different categories depending on whether an administrative evidentiary hearing has been held; and it should be noted that in all cases the question of whether such a hearing is held is completely at the option of the complainant. 5 C.F.R. §§713.217(b), 713.221(b). It should also be noted that the scope and nature of the agency's investigation of a complainant's allegations where no administrative hearing is held is completely controlled by the agency; and that even where the complainant elects to proceed to an administrative hearing, he has no rights to discovery comparable to those provided by the Federal Rules of Civil Procedure. 5 C.F.R. §§713.216, 713.218.[8]

[8] In the case at bar, petitioner is in the procedural posture represented by the first subdivision of circumstance 6: she invoked the district court's jurisdiction after a decision by the Civil Service Commission on her appeal from a final agency decision with a hearing.

It is immediately apparent from the six-category analysis set forth above that the only statutory prerequisite to maintaining a civil action common to all of the six circumstances listed is the filing of an administrative complaint; neither an agency or CSC decision, nor an administrative hearing, is a precondition to invocation of the judicial process. The language of Section 717 gives the federal employee or applicant for employment the right to invoke the judicial process in each of circumstances 1-6 and their subdivisions. It is highly significant that the statute and the CSC regulations make absolutely no distinction between the nature of the judicial proceedings afforded in the different circumstances. In each circumstance the civil action is simply "governed" by subsections 706(f) through (k). 42 U.S.C. §2000e-16(d). Since no distinctions are made among the rights of plaintiffs who are in different circumstances, the judicial process contemplated must be the same in all cases. And since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted.

In some of the circumstances enumerated anything less than a plenary judicial trial would be plainly unthinkable. For example, in circumstance 1 the plaintiff files his civil action after 180 days have elapsed with no final agency action on the initial administrative charge. It may be that the agency's investigation has not even been commenced; or there may have been an investigation but no CSC-appointed examiner's hearing; or there may have been a hearing but no examiner's findings; or there may have been a hearing

with findings but no final agency decision. In the first two cases, due process would clearly require the district court to hold an evidentiary hearing. In the third case, the absence of any findings by the officer who heard testimony would also dictate a new hearing before a judge who would make his own findings. In the fourth case there would at least be a record and findings for the judge to review. But regardless of the fact that each of these four cases could potentially arise within the confines of circumstance number 1, the statute draws no distinctions concerning the treatment to be accorded "civil actions" filed in the various cases described. Since a plenary trial is obviously required in the first three cases, it follows that it is required in the fourth and in other cases as well. Indeed, if Congress had intended that judicial proceedings under the 1972 amendments be limited to a "review of the record," it would certainly not have authorized suits in cases where there is no record to review.

As previously noted, the statute also contemplates situations other than those just described, *i.e.,* suit after final agency action, after final CSC action, and after the CSC has failed to render a decision within one hundred eighty (180) days. Each situation may or may not have involved an evidentiary hearing with findings. Yet despite the obvious differences among these situations, the statute makes no distinctions and the scope of the employee's "civil action" is not restricted under any of the various circumstances. Title VII is a remedial statute and the courts may not engraft upon it restrictions which it does not itself impose. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 798-9. It follows that the "civil action" to which a plaintiff is

entitled is, as the statutory language so clearly indicates, a plenary judicial proceeding, including presentation of the case to a district judge, who will hear and determine the case after discovery and a trial on the merits, and grant whatever relief is appropriate in light of his findings.[9]

C. The Legislative History of Amended Title VII Compels the Conclusion That Federal Sector Cases Are to Be Conducted in the Same Manner As All Other Cases.

The legislative history of the 1972 amendments to Title VII affirmatively indicates that Congress did not intend to limit the judicial function in federal sector Title VII litigation to review of an administrative record, but intended to grant federal sector plaintiffs the same rights as private sector litigants, including the right to a full evidentiary hearing in district court.

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[9] Where no administrative evidentiary hearing has been held and the administrative decision is based on an "investigative file" (5 C.F.R. § 713.216), the very term "trial *de novo*" is an obvious misnomer for the result here advocated. In such cases, a plenary judicial trial will be the first "live", non-paper proceeding to occur. It is interesting to note, therefore, that in the majority of complaints that are administratively processed, no hearing is held. U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* Vol. V, " To Eliminate Employment Discrimination" (July, 1975), at p. 76 n.257.

This is not to suggest, of course, that the term "trial *de novo*" is appropriate even where, as in the case at bar, an administrative hearing has been held. For such a hearing is by no means the equivalent of a judicial trial. *See, Hackley* v. *Roudebush, supra* 520 F.2d at 137-141. But the point here is that the statute makes no distinctions between cases where an administrative hearing has been held and those where no administrative hearing has been held; and that, ultimately, the question presented by the case at bar is controlled by considerations far broader than whether an administrative hearing has been held, or whether the administrative procedure is or is not efficaciously designed. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 169-172 (Leventhal, J., concurring).

Indeed, as will be shown *infra,* at many points in the legislative history of the 1972 amendments the draft legislation granted federal sector litigants not less, but *more* extensive judicial rights than private sector litigants, who were in certain circumstances to be limited to review in a court of appeals of an EEOC record. In the legislation as finally enacted, however, all differences in judicial procedures were eliminated, and private sector and federal sector litigants were, as shown in Argument I(B), *supra,* covered by the same civil action procedures in all circumstances. The 1972 amendments as finally enacted thus implement the clear purpose evinced by the legislative history taken as a whole: to grant the same treatment in the courts to *all* Title VII litigants, in the private sector, the state and local government sector, and the federal sector.

The Senate Committee Report on the new subsection 717(c) authoritatively states the legislative purpose behind the creation of a right of action under Title VII in the federal sector:

> "Aggrieved employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under Title VII.*" S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16 (1971); Subcommittee on Labor, Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972,* 92d Cong., 2d Sess. (Committee Print, 1972) [hereinafter cited as *History*], at 425 (emphasis added).

This congressional equation of the rights of federal and private sector plaintiffs is crucial, since private sector plaintiffs who have met the jurisdictional pre-

requisites to maintenance of a civil action are entitled to a full evidentiary hearing in district court, regardless of the outcome of prior administrative or arbitral proceedings. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

In what follows, petitioner sets forth her analysis of the legislative history of the 1972 federal sector amendments. In addition, petitioner respectfully requests that the Court refer to the exhaustive analysis of the District of Columbia Circuit in *Hackley* v. *Roudebush,* 520 F.2d 108, 122-148 (D.C. Cir. 1975), where the legislative history is "set out at length in Judge Wright's opinion in order to present the full picture . . . ." *Id.,* 520 F.2d at 170 (Leventhal, J., concurring).[10] The *Hackley* opinion is worthy of the Court's attention both because it explores all details of the legislative history with meticulous care, and because it discusses the various arguments that the government has in the past advanced in support of its contrary interpretation.

1. The Evolution of the Final 1972 Legislation, and the Structure of the Other Proposals That Were Considered

Prior to the 1972 amendments, Title VII did not apply to federal employees. Congress had however previously declared it to be "the policy of the United States to insure equal employment opportunities for

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[10] The *Hackley* court unanimously endorsed Judge Wright's analysis of the legislative history. Judges Leventhal and Davis deemed it unnecessary to discuss the empirical question of the recent performance of the Civil Service Commission, and did not, therefore, join in the portion of Judge Wright's opinion which dealt with that question. *Id.,* 520 F.2d at 169-172.

Federal employees without discrimination because of race, color, religion, sex, or national origin. . . ." 5 U.S.C. § 7151. The primary responsibility for implementing this policy prior to the 1972 amendments to Title VII lay with the Civil Service Commission (CSC) under Executive Order 11246 (1965), later superseded by Executive Order 11478 (1969).

The CSC's efforts had proven to be utterly inadequate. "[T]he mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part." *Morton* v. *Mancari,* 417 U.S. 535, 546 (1974) (footnote omitted). Minorities and women continued to be vastly underrepresented or underemployed in many federal agencies. As the House Committee on Education and Labor reported in June 1971, the CSC was responsible for a "critical defect" in the federal government's efforts to implement a policy of equal employment opportunity. The administrative process for investigating and resolving discrimination complaints—a process which was, then as now, devised and overseen by the CSC[11]—actually "impeded rather than advanced" the goal of eliminating discrimination, and

[11] Detailed CSC regulations for processing complaints of discrimination which were quite similar to the regulations now in effect were already in existence three years prior to the 1972 amendments. The regulations were expanded somewhat after the amendments, to include, for example, provisions concerning the right to sue provided by the amendments, clarifying the authority to award certain types of relief, and allowing third party allegations (but recognizing no right to sue on the basis of such allegations). In most other respects, the regulations are basically unchanged. *Compare* 5 C.F.R. Part 713, 34 Fed. Reg. 5367 (Mar. 19, 1969), as amended at 34 Fed. Reg. 14023 (Sept. 4, 1969) *with* 5 C.F.R. Part 713, 37 Fed. Reg. 25669 (Dec. 2, 1972). *See also, Hackley* v. *Roudebush, supra,* 520 F.2d at 137-142.

led to "a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees."[12] Under the CSC regulations—then as now—the supposedly independent hearing examiner's findings and decision on a discrimination complaint were merely recommendations to the offending agency, which in turn would render the final decision itself. Thus, the agency acted as both defendant and judge.[13]

Successful appeals to the CSC's Board of Appeals and Review were understandably rare.[14] The House Committee found that

> ". . . the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. . . . The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion." *House Report* at 24; *History* at 84.

Lack of expertise was not the only explanation for the CSC's failures, for, as the Committee aptly noted:

[12] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 23-4 (1971) (hereinafter cited as *House Report*); *History* at 83-4; cited in part in *Morton* v. *Mancari, supra,* 417 U.S. at 546 n.22.

[13] The continued workings of this process are vividly illustrated by the case at bar, in which the hearing examiner found that petitioner had been discriminated against, and the defendant agency simply rejected the examiner's adverse findings. (Pet. App. 1a-17a, 18a-21a).

[14] In the case at bar, the Board of Appeals and Review affirmed the defendant agency's decision against petitioner. (Pet. App. 21a-29a).

> "The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." *House Report* at 24, *History* at 84.

In the face of these findings, the House Committee favorably reported the "Hawkins Bill" (named after its chief sponsor, Representative Hawkins), which prohibited discrimination in federal hiring and promotion, and authorized the Equal Employment Opportunity Commission (EEOC), rather than the CSC, to enforce that prohibition.[15]

The Hawkins Bill also granted the EEOC power to issue cease and desist orders in private sector actions, as well as "authority to enforce" by rule, regulation, and order, the federal sector anti-discrimination provisions of Title VII.[16] Federal and private sector parties aggrieved by any order of the EEOC were entitled to bring actions in federal court. *However, the scope of the judicial proceedings after an EEOC hearing was much more limited in private sector cases than in federal sector cases.*

In private sector cases, under the Hawkins Bill, judicial review after an EEOC hearing was governed by amended Section 706. Such review was in a United States Court of Appeals; and the findings of the Commission were conclusive if supported by substantial

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[15] H.R. 1746, 92d Cong., 1st Sess. (1971); *History* at 32-60; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 159-163.

[16] H.R. 1746, § 11, 92d Cong., 1st Sess. (1971), proposing to add new subsection 717(b) to the Civil Rights Act of 1964; *History* at 59; *Hackley* v. *Roudebush, supra,* 520 F.2d at 163.

evidence.[17] This would have represented a change in the existing law, which clearly granted all private sector employees the right to a plenary judicial hearing. Under the Hawkins Bill the judicial process could also be invoked in private sector cases without an EEOC hearing: for example, when the EEOC dismissed a complaint without a hearing for lack of reasonable cause, or when the EEOC failed to take action on a complaint within 180 days of its filing. Private sector actions in these circumstances were governed by a new Section 715, which provided for a civil action in federal district court. Since there would be no administrative record to review in these cases, the judicial process in these circumstances was not limited to review of an administrative record.[18]

In federal sector cases, under the Hawkins Bill, *all* judicial proceedings, whether or not there had been an EEOC hearing, were governed by Section 715, the section applicable to private sector actions in which there had been no EEOC hearing.[19] Under the Hawkins Bill, therefore, federal sector actions were not limited to a review of the administrative proceedings in any circumstances. *All* federal sector actions were plenary judicial proceedings in the district court.

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[17] H.R. 1746, § 4, 92d Cong., 1st Sess. (1971), proposing to amend Section 706 of the Civil Rights Act of 1964; *History* at 33-44; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 159-161.

[18] H.R. 1746, § 8(j), 92d Cong., 1st Sess. (1971), proposing to add new Section 715 to the Civil Rights Act of 1964; *History* at 54-8; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 162-3.

[19] H.R. 1746, § 11, 92d Cong., 1st Sess. (1971), proposing to add new subsection 717(d) to the Civil Rights Act of 1964; *History* at 59; *Hackley* v. *Roudebush, supra,* 520 F.2d at 163.

In the House, the provision of the Hawkins Bill granting the EEOC cease and desist powers met considerable resistance. The House adopted the "Erlenborn Bill" (sponsored by Representative Erlenborn) as an amendment to the Hawkins Bill in the nature of a complete substitute. The Erlenborn substitute did not provide EEOC with cease and desist powers, and did not cover federal employees at all.[20]

On the Senate side, the "Williams Bill" (named after Senator Williams, its chief sponsor) was the equivalent of the Hawkins Bill.[21] The amended version of the Williams Bill which emerged from the Senate Committee on Labor and Public Welfare (the "Committee Bill") [22] contained essentially the same provisions—and the same dichotomies— regarding federal sector and private sector actions which had been contained in the Hawkins Bill. Under the Committee Bill, however, the CSC was substituted for the EEOC as the administrative agency with enforcement authority in the federal sector. Under the Committee Bill, the powers of the CSC were the same as those of the EEOC in the federal sector under the Hawkins Bill, and the provisions for judicial review of CSC action were the same as those for review of EEOC federal sector action under the Hawkins Bill. Federal sector plaintiffs had the option to enter court after final agency or CSC action. *All* federal sector actions were plenary judicial

[20] H.R. 9247, 92d Cong., 1st Sess. (1971); *History* at 141-7; amendment in nature of substitute agreed to, *History* at 311-314; *see*, House Bill as referred to Senate, H.R. 1746, 92d Cong., 1st Sess. (1971); *History* at 326-332.

[21] S. 2515, 92d Cong., 1st Sess. (1971); *History* at 157-187.

[22] S. 2515, 92d Cong., 1st Sess. (1971); *History* at 344-409; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 163-8.

proceedings in the district court, governed by the same provisions that governed private sector actions without an EEOC hearing; federal sector actions, unlike private sector actions, were not limited to a review of the administrative proceedings in any circumstances.[23]

Since the Committee Bill gave the EEOC cease and desist powers in the private sector, it, like the Hawkins Bill in the House, encountered a stiff floor fight, and also a filibuster which was eventually terminated by cloture. Ultimately, the EEOC private sector cease and desist authority was dropped, but the Committee Bill's federal sector provisions were retained. Under the finally enacted legislation [24]—as under the Hawkins Bill and the Committee Bill—the scope of judicial proceedings in federal sector cases was not restricted, and was governed by the private sector civil action provisions affording a plenary judicial trial.[25] Thus the continuation of responsibility for the administrative enforcement of federal sector Title VII policy in the CSC rather than the EEOC—under the Committee Bill and the legislation as finally enacted [26]—in no way limited judicial review of federal agency action. The CSC under the Committee Bill had the same responsibilities and powers as the EEOC had in the federal sector under the Hawkins and Williams bills; and as noted above, *federal sector actions were governed by*

[23] S. 2515, §§ 4, 11, 92d Cong., 1st Sess. (1971), proposing to amend the Civil Rights Act of 1964 by renumbered subsections 706(q)-(w) and new subsection 717(d); *History* at 390-393, 408; *Hackley* v. *Roudebush, supra,* 520 F.2d at 166-8.

[24] Pub. L. 92-261 (Mar. 24, 1972); *History* at 1911-1921. [*See also,* Title VII as amended, *History* at 1892-1910.]

[25] 42 U.S.C. §§ 2000e-5(f)-(k), 2000e-16(d).

[26] 42 U.S.C. § 2000e-16(b).

exactly the same provisions under all three bills, namely, the district court civil action provisions which did not limit the court to review of the administrative record. Again, as explained in detail in Argument I(B), *supra,* it is these same provisions which govern federal sector actions—as well as private sector and state and local government sector actions—under the 1972 amendments as finally enacted.

2. The Authoritative Statements of Legislative Intent

Turning now from the foregoing technical analysis to the larger perspective, it is clear that the unitary structure of amended Title VII—under which all civil actions are governed by the same judicial procedures—fully implements the basic congressional purpose with respect to the federal sector. That purpose, consistently articulated throughout the hearings, reports, and debates on the 1972 amendments, was to place federal employees and applicants on a par with employees and applicants in the private sector.

Thus the House Committee stated that

> ". . . there can exist no justification for anything but a vigorous effort to accord Federal employees *the same rights and impartial treatment* which the law seeks to afford employees in the private sector." *House Report* at 23; *History* at 83 (emphasis added).

The Senate Committee report was to the same effect:

> "Aggrieved [Federal] employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under title VII.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. at 16 (1971); *History* at 425 (emphasis added).

Senator Dominick and Senator Cranston were chiefly responsible for the Committee compromise which gave administrative enforcement responsibility to the CSC rather than the EEOC while guaranteeing the federal employee the right to a judicial determination of his complaint. Senator Dominick supported Title VII protection for federal employees, but opposed (ultimately with success) giving the EEOC cease and desist powers in the private sector because he felt that the courts would provide a fairer and more efficient forum than an administrative agency. He stated his view of the proper relationship between private sector cases and cases against federal, state and local government defendants as follows:

> "[I]t strikes me that one of the first things we have to do is at least to *put employees holding their jobs, be they government or private employees, on the same plane so that they have the same rights, so that they have the same opportunities,* and so that they have the same equality within their jobs, to make sure that they are not being discriminated against and have the enforcement, investigatory procedure carried out the same way." 118 Cong. Rec. 594 (Jan. 20, 1972); *History* at 680-681 (emphasis added).

And in the following passage, Senator Dominick successfully urged defeat of cease and desist and limited judicial review in the private sector, and discussed the effect of the Committee compromise in the federal sector:

> "[Under Section 717 and other provisions of the Committee compromise] *every governmental*

> *agency and every employee of a governmental agency, State, local, or Federal, has his rights in the Federal courts.* Under [S. 2515, granting EEOC cease and desist power and limiting review in private civil actions] . . . you do not have that right if you are a private employee or a private employer. I, for the life of me, cannot see why we should discriminate against that one group. It seems to me that where we are dealing with job discrimination, it makes no difference what type of job you have, *you should be entitled to the same remedies as anyone else in that situation has, and this is the right to have the Federal court determine whether or not you have been discriminated against.*" 118 Cong. Rec. 3967 (Feb. 15, 1972); *History* at 1527 (emphasis added).

The record of Senate debate is permeated with Senator Dominick's restatement of this need for identical treatment of all employees.[27]

The House Committee and Senate Committee statements, and remarks by Senator Dominick, are the most authoritative expressions of the basic congressional intent with respect to the 1972 amendments. In view of the pivotal role played by Senator Dominick [28] with respect to the matters relevant here, and the fact that the amendments as enacted clearly constitute an adoption of the viewpoint which he advocated on these matters, Senator Dominick's comments are plainly to be accorded considerable weight.

The weight to be attached to certain statements by Senator Cranston and Senator Williams, on the other

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[27] 118 Cong. Rec. 595 (Jan. 20, 1972), 698 (Jan. 21, 1972), 942, 943 (Jan. 24, 1972), 3389 (Feb. 9, 1972), 3809 (Feb. 14, 1972); *History* at 683, 695, 833, 835, 1440-1441, 1482.

[28] *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 129-131, 144-6.

hand, has been the subject of controversy. While this controversy is understandable, it is, in petitioner's view, not of controlling significance, because of the overwhelming weight of the authoritative legislative history already described.

Senator Cranston made the following statement, which supports petitioner's position in the case at bar, with respect to the precise legal effect of the Committee compromise in the federal sector that he and Senator Dominick co-authored:

> "As with other cases brought under Title VII of the Civil Rights Act of 1964, *Federal district court review would not be based on the agency and/or CSC record and would be a trial de novo.*" 118 Cong. Rec. 4929 (Feb. 22, 1972) (emphasis added).

The question of the weight that may be attached to this remark in view of the manner in which it was originally reported in the *Congressional Record* is discussed in the margin.[29]

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[29] Senator Cranston's remark as originally reported in the daily edition of the *Congressional Record* [118 Cong. Rec. S 2287 (daily ed., Feb. 22, 1972); *History* at 1744] was, due to a transposition of the word 'not', to the opposite effect from the remark as quoted in the text, *supra.* Senator Cranston spoke to this matter, and corrected the *Record,* ten months after the 1972 amendments became effective. 119 Cong. Rec. S 1219 (daily ed., Jan. 23, 1973). The Third Circuit and the District of Columbia Circuit, while agreeing with the corrected version of Senator Cranston's comment, have not relied upon it. *Sperling* v. *United States,* 515 F.2d 465, 480-481 n.72 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247; *Hackley* v. *Roudebush, supra,* 520 F.2d at 133-4, 147-8. Petitioner submits, however, that the corrected version of the comment is not wholly neutralized by its surrounding circumstances. First, the uncorrected version of the comment is plainly inconsistent on its face because it wrongly portrays the law under the Civil Rights Act of 1964. Thus, Senator Cranston's assertion that the *Record,*

Senator Williams made a number of statements which are inconsistent with one another and even, in the case of the following statement, internally inconsistent:

> "Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for *a review of the administrative proceeding record* after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. There is no reason why a Federal employee should not have *the same private right of action enjoyed by individuals in the private sector*; and I believe that the committee has acted wisely in this regard." 118 Cong. Rec. 4922 (Feb. 22, 1972); *History* at 1727 (emphasis added).

The reasons why no weight should be attached to this and certain other comments by Senator Williams are discussed in the margin.[30]

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and not he, was in error is the most plausible explanation of the matter. Second, it appears to petitioner that the uncorrected version printed in the daily edition of the *Record* could not have influenced the Senate vote on the federal sector amendments. That vote took place on February 22, 1972—the same day that Senator Cranston's comments were made, and, it seems fair to assume, before the daily edition of the *Record* for that date was printed and available. 118 Cong. Rec. 4944 (Feb. 22, 1972); *History* at 1779.

[30] The statement quoted in the text is internally inconsistent both because the Committee Bill, as noted above, provided that all federal sector actions were to be civil actions in the district court rather than actions for review of administrative determinations in the court of appeals; and because the Dominick amendment, eliminating cease and desist and court of appeals review in the private

Petitioner believes that Senator Cranston's statement is an additional item which may properly be considered to support her position, and that Senator Williams' statements are so self-contradictory that they may not properly be considered to detract from her position. More importantly, however, the controversy over the Cranston and Williams statements simply cannot obscure the clear thrust of the legislative history taken as a whole and set forth *supra*. That legislative history lends itself to only one fair interpretation: the 1972 amendments to Title VII were intended to give federal victims of employment discrimination the same civil action rights as private employees possess, including the right to a plenary judicial trial. This has been the conclusion of the two courts of appeals which have engaged in a detailed analysis of the legislative history. *Hackley* v. *Roudebush, supra; Sperling* v. *United States, supra*. The opinion of the court of appeals in the case at bar is devoid of any analysis in support of its contrary conclusion.

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sector and substituting plenary judicial proceedings in district court, had already been adopted. Similarly, the reference to "review of the agency proceedings" in one analysis of S. 2515 which Senator Williams inserted into the record [118 Cong. Rec. 4923 (Feb. 22, 1972); *History* at 1730] is inconsistent in this respect with the Williams Committee's own report on Section 717 [S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16-17, 45-6 (1971); *History* at 425, 454-5], as well as with a section-by-section analysis of the 1972 amendments as finally enacted which Senator Williams inserted into the record: "The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment." 118 Cong. Rec. 7169 (Mar. 6, 1972); *History* at 1851. The Third Circuit and the District of Columbia Circuit have each analyzed in detail, and properly rejected, Senator Williams' references to "review of agency proceedings." *Sperling* v. *United States, supra,* 515 F.2d at 479-481, 480 n.71; *Hackley* v. *Roudebush, supra,* 520 F.2d at 132-5, 146-7.

3. The Consistent Logic of the Final Legislative Product

The congressional intent to afford plenary judicial proceedings in federal sector cases is perfectly consistent with the contemporaneous determination to maintain the Civil Service Commission's administrative role in the federal sector. (*See,* 42 U.S.C. § 2000e-16(b)). Congress intended that the courts would provide federal sector litigants a full evidentiary hearing as a check on the Civil Service Commission, just as it intended that the courts would provide private sector litigants a full evidentiary hearing as a check on the Equal Employment Opportunity Commission. The opportunity for a full judicial hearing was provided in both federal and private sector cases in part because Congress expressly recognized that both CSC and EEOC were inherently partisans, though partisans of different standards. CSC was viewed as a partisan of the federal employer, since it is responsible for the approval of the very agency employment standards whose lawfulness many Title VII complainants call into question. EEOC was viewed as a partisan of the private employee, since it is the prosecutor of his case.

Thus the Senate Committee report on Section 717 states: [31]

> "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for

[31] For further remarks regarding Civil Service Commission bias, *see* Remarks of Rep. Fauntroy, 117 Cong. Rec. 32094-5 (Sept. 16, 1971), *History* at 269-271; and Remarks of Rep. Mink, 117 Cong. Rec. 32105 (Sept. 16, 1971), *History* at 299. The "built-in conflict of interest" characterization is also contained in the *House Report* at 24, *History* at 84, quoted *supra,* text at p. 34.

> examining the Government's equal employment program for structural defects which may result in a lack of true equal employment opportunity.
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> * * *
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> "An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision." S. Rep. No. 92-415, 92d Cong., 1st Sess. at 15-16 (1971); *History* at 424-5.

This passage concerning the federal sector is precisely analogous to a statement of Senator Dominick, who described the difference between committing the evidentiary proceeding in private sector Title VII litigation to EEOC and committing this function to a federal court (which could appoint a special master) in these terms: [32]

> "[T]he latter preserves the impartiality of the court, the jurisdiction of the court, and the integrity of the referees and examiners who have been trained in that field. But if we assign [evidentiary determinations] to the Commission, . . . the Commission is going to prosecute, investigate, and hear the case, and then say to the court, 'OK, these are our recommendations, which have the substantial force of evidence; you enforce them.'" 118 Cong. Rec. 3389 (Feb. 9, 1972); *History* at 1441.

Congress responded to concerns such as those expressed by Senator Dominick and applied its response to both private and federal sector actions: EEOC cease

[32] For further remarks regarding EEOC partisanship, *see* Minority Views on H.R. 1746, *House Report* at 58-9, *History* at 118-119; Remarks of Senator Dominick, 118 Cong. Rec. 3966-7 (Feb. 15, 1972), *History* at 1524-1527.

and desist power was rejected, and amended Title VII provides for plenary court hearings (and the possible appointment by the court of a special master) in both federal and private sector proceedings. 42 U.S.C. §§ 2000e-16(d) and 2000e-5(f)(5).[33]

The conclusion that Congress granted federal sector litigants the right to a full evidentiary hearing in court is also fully consistent with the purpose of maintaining an internal grievance procedure within the federal government. Congress carefully provided in subsection 717(c) that prior to filing suit under Title VII a federal sector complainant must first file a formal complaint with his agency, and await an agency decision, so that the agency will have an opportunity to put its own house in order. As soon as the agency reaches a decision, however, or permits 180 days to pass without taking final action, this policy has been fulfilled, and the complainant may proceed directly to court. If the complainant prefers first to proceed to further stages in the internal grievance procedure, he is free to do so; but no penalty attaches to such an election (so as not to deter further resort to administrative procedures), and subsequent timely resort to a court action still results in a plenary judicial trial. These conclu-

[33] While the EEOC has never had enforcement powers, the CSC's enforcement powers pre-dated the 1972 amendments. The proposed substitution of EEOC for CSC in the federal scetor was rejected. The fact that no opposition was then raised to continued CSC enforcement powers is fully consistent with the foregoing analysis. The initial proponents of the 1972 amendments would have had no occasion to object at this point to CSC enforcement powers, since the legislation provided plenary judicial proceedings in federal sector cases. The CSC, of course, wished to retain its powers; and its pro-defendant bias would have precluded any fears that a federal defendant would suffer from any lack of due process at its hands.

sions are perfectly consistent with the dual policy of preserving the internal grievance procedure but also providing a judicial remedy.

D. The Lower Court Decisions under Amended Title VII May Be Analyzed in Terms of Three Basic Categories.

1. Overview of the Cases

When the petition for certiorari was filed herein, the rule advocated by petitioner was a minority position in the lower courts. At this writing, the lower courts are evenly divided on the issue.

Three courts of appeals—the Third, Seventh, and District of Columbia Circuits—have ruled that federal sector Title VII cases are, like all other Title VII cases, to be conducted as plenary judicial proceedings. *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247;[34] *Caro* v. *Schultz,* 521 F.2d 1084 (7th Cir. 1975)[35]; *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975)[36].

Three other courts of appeals—the Eight, Ninth, and Tenth Circuits—have rejected this approach, and provided for less than plenary judicial proceedings. *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975), *pet. for cert. pending,* No. 74-1600; *Chandler* v. *Johnson,* 515 F.2d 251 (9th Cir. 1975), *cert. granted sub nom Chandler* v. *Roudebush,* 44 U.S.L.W. 3200 (U.S., Oct. 6, 1975) (the case at bar)[37]; *Haire* v. *Cal-*

[34] *Accord, Ettinger* v. *Johnson,* 518 F.2d 648 (3rd Cir. 1975).

[35] *See also, Adams* v. *Brinegar,* 521 F.2d 129, 132-3 (7th Cir. 1975).

[36] *See also, Grubbs* v. *Butz,* 514 F.2d 1323 (D.C. Cir. 1975).

[37] *Cf., Bowers* v. *Campbell,* 505 F.2d 1155 (9th Cir. 1974) (decided under 42 U.S.C. § 1981).

loway, —— F.2d ——, 10 [CCH] EPD ¶——, 11 F.E.P. Cases 769, 8th Cir. Nos. 74-2004, 75-1050, Nov. 17, 1975.

The other circuits have not yet ruled on the issue.[38] However, a decision of the Fifth Circuit on a related issue[39] strongly suggests agreement with petitioner's position on the issue in the case at bar:

> ". . . the instant federal employee suit is brought under Title VII. The intent of Congress in enacting the 1972 amendments to that Act extending its coverage to federal employment was to give those public employees the same rights as private employees enjoy." *Parks* v. *Dunlop,* 517 F.2d 785, 787 (5th Cir. 1975) (footnotes omitted).[40]

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[38] In *Fisher* v. *Brennan,* 517 F.2d 1404 (6th Cir. 1975), the court of appeals affirmed, without published opinion, the district court decision in 384 F.Supp. 174 (E.D. Tenn. 1974). Petitioner has examined the unpublished order of affirmance and the briefs of the parties in this case. It is clear that the scope of review issue was not raised in the court of appeals, and that the summary affirmance does not constitute a ruling on the issue. Petitioner assumes that respondents will not contend otherwise.

Similarly, it seems clear from the court of appeals' opinion in *Johnson* v. *U.S. Postal Service,* 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam,* 497 F.2d 128 (5th Cir. 1974), that the scope of review issue was not raised in that appeal.

[39] The availability in the federal sector of preliminary injunctive relief under *Drew* v. *Liberty Mutual Ins. Co.,* 480 F.2d 69 (5th Cir. 1973).

[40] In addition, it is noteworthy that the Fourth Circuit, in ruling on another issue under the federal sector Title VII provisions, made reference to the 1972 amendments' "transfer of jurisdiction from the executive to the judiciary"; to "a congressional policy to make the courts the final tribunal for the resolution of controversies over charges in discrimination" in federal employment; and to the portion of the legislative history to the effect that the amendments provide to federal sector plainiffs "the full rights available in the courts as are granted to individuals in the

Most of the published district court decisions are cited in the petition for certiorari, and are not recited here. (Pet. 10 n.6, 10-12 n.7). Additional published district court cases holding in favor of[41] and against[42] plenary judicial proceedings are set forth in

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private sector under Title VII." *Koger* v. *Ball,* 497 F.2d 702, 706, 708-9 n.33 (4th Cir. 1974). The Solicitor General seems to have expressed agreement with the Fourth Circuit's analysis on the issue which *Koger* addressed. Memorandum in Response to Petition for Rehearing, at p. 4, *Place* v. *Weinberger,* No. 74-116 (October Term, 1974).

[41] *Second Circuit: McHoney* v. *Callaway,* 10 EPD ¶——, 11 F.E.P. Cases ——, E.D. N.Y., No. 74-C-1729, Oct. 10, 1975.

Fourth Circuit: Harris v. *Ulanich,* 10 EPD ¶ 10,262 (E.D. Va. 1974); *Chisholm* v. *U.S. Postal Service,* 9 EPD ¶ 10,212, 11 F.E.P. Cases 457 (W.D. N.C. 1975), *appeal pending,* 4th Cir. Nos. 75-2068, 75-2069.

Fifth Circuit: Jones v. *Brennan,* —— F.Supp. ——, 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Ga., Atl. Div., Civ. No. 19139, Sept. 30, 1975; *Keeler* v. *Hills,* 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Ga., Atl. Div., C.A. Nos. C74-2152A, C74-2309A, Nov. 12, 1975. [*Sylvester* v. *U.S. Postal Service,* cited at Pet. 10 n.6, is also reported at 393 F.Supp. 1334.]

Sixth Circuit: Williams v. *Tennessee Valley Authority,* 10 EPD ¶——, 11 F.E.P. Cases ——, M.D. Tenn., C.A. No. 75-186-NA-CV, Nov. 21, 1975.

Ninth Circuit: Ellis v. *Naval Air Rework Facility,* 10 EPD ¶ 10,257, 11 F.E.P. Cases 317 (N.D. Cal. 1975), 10 EPD ¶ 10,422, 11 F.E.P. Cases —— (N.D. Cal. 1975), 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Cal., No. C-73-1794 WHO, Nov. 4, 1975.

District of Columbia Circuit: Early v. *Klassen,* 10 EPD ¶——, 11 F.E.P. Cases ——, D.D.C., C.A. No. 75-153, Oct. 30, 1975.

[42] *Third Circuit: Warren* v. *Veterans Hospital,* 382 F.Supp. 303 (E.D. Pa. 1974); *McCreesh* v. *Berude,* 385 F.Supp. 1365 (E.D. Pa. 1974).

Fourth Circuit: Wright v. *Nat'l Archives and Records Service,* 388 F.Supp. 1205 (D. Md. 1975), *appeal pending,* 4th Cir. No. 75-1378.

Fifth Circuit: Davis v. *Dept. of H.E.W.,* 10 EPD ¶ 10,431 (E.D.

the margin. In the five circuits where the courts of appeals have not yet ruled on the issue, the cases are close to evenly divided.

2. The Three Different Rules Which Have Been Adopted

The cases in the lower courts may be analyzed in terms of three basic categories. First, three courts of appeals hold, with petitioner, that federal sector Title VII cases are, like all other cases, to be conducted as plenary judicial proceedings. Second, one court of appeals holds that such cases are to be conducted as reviews of the administrative record pursuant to a substantial evidence standard. Third, two courts of appeals hold for a hybrid approach, in which the primary focus is on review of the administrative record, but in which the plaintiff may supplement the administrative record upon a showing of necessity.

a. Plenary Judicial Proceedings

In the first court of appeals decision to hold for plenary judicial proceedings, the Third Circuit concluded that

> ". . . it was Congress' intent to provide an aggrieved federal employee with as full a panoply of remedies in the district court as those afforded a private sector litigant. . . . We hold therefore

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La. 1975); *Anderson* v. *Roudebush*, 10 EPD ¶ 10,328 (S.D. Ga. 1975).

Ninth Circuit: Jewell v. *Middendorf*, 10 F.E.P. Cases 1110 (C.D. Cal. 1975).

Tenth Circuit: Archuleta v. *Callaway*, 385 F.Supp. 385 (D. Colo. 1974).

District of Columbia Circuit: Johnson v. *Clotworthy*, 10 EPD ¶ 10,315 (D.D.C. 1975).

> that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c)." *Sperling* v. *United States*, *supra*, 515 F.2d at 481.

Sperling was followed by the Seventh Circuit, which noted that its conclusion was "in accord with the special regard that Congress has shown for those who suffer discrimination in employment." *Caro* v. *Schultz*, *supra*, 521 F.2d at 1088.[43] The Third and Seventh Circuits were then joined by the District of Columbia Circuit, which, in an encyclopedic opinion, unanimously and resoundingly reversed the seminal district court decision which had led numerous other courts astray on this issue.[44] The District of Columbia Circuit concluded

> ". . . that Congress intended to bestow on federal employees the same rights in District Court—including the right to a trial *de novo*—which it had previously mandated for private sector employees, and that the Federal Rules of Civil Procedure are flexible enough to enable trial judges to prevent such *de novo* trials from unduly burdening the courts or substantially duplicating agency proceedings." *Hackley* v. *Roudebush*, *supra*, 520 F.2d at 113 (footnote omitted).

It should be noted that none of the cases providing for plenary judicial proceedings excludes the possi-

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[43] The Seventh Circuit's opinion noted that "Because we are choosing one of the views on which there is a conflict between circuits, this opinion was circulated, before filing, to all judges of this Court in regular active service. There has been no request for a vote on a hearing *en banc* on this issue." *Id.*, at 1088 n.6.

[44] *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush*, *supra*.

bility of summary judgment being entered in some cases. But only a real summary judgment, within the ordinary and accepted meaning of Fed.R.Civ.P. 56(c), would be possible, *i.e.,* summary judgment in a situation where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Sperling* v. *United States, supra,* 515 F.2d at 481-4; *Caro* v. *Schultz, supra,* 521 F.2d at 1089; *Hackley* v. *Roudebush, supra,* 520 F.2d at 157-8.[45]

b. Review Strictly Limited to the Administrative Record

The first court of appeals decision to reject plenary judicial proceedings was also the first appellate decision on the issue. The Tenth Circuit held that

> "The complaints of the nature here considered should be handled as others [under the Civil Service system], and if they reach the courts, the procedure should be consistent with those under 5 U.S.C. § 701 *et seq.*" *Salone* v. *United States, supra,* 511 F.2d at 904.

Salone represents the second category of decisions referred to above, under which the standard of the pre-

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[45] In some situations the administrative record might itself provide a basis for summary judgment. If, for example, uncontroverted evidence established that the plaintiff was never employed by and never applied for employment with the defendant agency, there would obviously be no genuine issue of material fact and the court could dispose of the plaintiff's fraudulent claim by summary judgment. Or, of course, the parties might agree to have the district court decide the case on the administrative record. But in most cases discovery would, if desired, have to be permitted before a motion for summary judgment could even be considered. Moreover, it must be recognized that summary judgments are rarely encountered in Title VII cases when the facts are contested.

Title VII adverse action cases is applied, and the decision of the agency or the Civil Service Commission is to be upheld if it is supported by "substantial evidence" in the administrative record.

c. Hybrid Approaches

The first court of appeals to adopt a hybrid approach—representing the third category of decisions referred to above—was the Ninth Circuit, in the case at bar. Here the court of appeals referred with approval to the district court decision in *Hackley* v. *Roudebush, supra* (hereinafter *'Hackley I'*), which held that

> "The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." *Hackley* v. *Johnson,* 360 F.Supp. 1247, 1252 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush, supra.*

While the court referred to *Hackley I* with approval, it is not clear whether it fully adopted the standard quoted above. *See, Chandler* v. *Johnson, supra,* 515 F.2d at 255. What is clear is that the Ninth Circuit held that a plaintiff who desires that the judicial proceedings extend beyond a review of the administrative record must make a specific showing—in the case at bar without any prior discovery—that more than a re-

view of the record is necessary in the circumstances of his or her particular case. *Id.*, at 255.

In a recent case the Eighth Circuit joined the Ninth as an exemplar of the category of decisions which adopt a hybrid approach. The Eight Circuit articulated its holding as follows:

> ". . . while we generally agree with the District of Columbia, Third, and Seventh Circuits that a federal employee is entitled to a judicial determination of the merits of his claim, we think district courts posses the power to make that decision summarily upon an administrative record that is fairly made and that completely discloses the relevant facts upon which the plaintiff relies.
>
> "As a corollary, the district court, on a showing of need, should exercise its discretion to re-open the record and hear additional evidence or permit the plaintiff to proceed to develop additional relevant evidence through discovery procedures. This discretion should be liberally exercised in order to assure that the federal employee-plaintiff is given a full and fair opportunity to develop all the facts bearing upon his claim.
>
> "However, where there is no sound basis for re-opening the record, the district court, without more, may proceed to a decision on the merits." *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 772 (footnote omitted).

Thus, under *Haire* as under the Ninth Circuit's decision in the case at bar, the focus of the judicial proceedings is on the administrative record, which may be "re-opened" and "supplemented" only upon a showing of necessity. However, the language in *Haire* concerning the circumstances under which the plaintiff may be permitted to conduct discovery is perhaps

more generous in tone than the language that the Ninth Circuit employed, which requires the plaintiff to show "that without judicial discovery, a case could not be made." 515 F.2d at 255.[46]

d. The Government's Position

It is not possible for petitioner to know at this point what position the respondents will adopt in this Court on the issue presented in the case at bar. It seems unlikely that error will be confessed.[47] As recently as October 23, 1975, the Department of Justice stated its position as follows in the Fifth Circuit:

> "This memorandum is filed in response to the October 8, 1975, request of this Court for a statement of the position of the Department of Justice on the availability to federal employees of a trial *de novo* in suits alleging discrimination in violation of Title VII of the Civil Rights Act.
>
> "The Department's position is that federal employees bringing discrimination suits under 42

[46] *Cf., Bowers* v. *Campbell, supra,* 505 F.2d at 1160-1161. In *Bowers,* decided under 42 U.S.C. § 1981, the Ninth Circuit provided for "a de novo decision by the district court based primarily on the administrative record (if it is determined to be fair and adequate) with provision for the admission of additional evidence. . . ." *Id.*, at 1161. "Both the employee and the employer shall have the *right* to adduce additional evidence to supplement the administrative record." *Id.* (emphasis added). *Bowers* thus appears to go beyond *Hackley I, Chandler* and *Haire,* since it provides a *right* to adduce additional evidence, and also since it would seem to imply a *right* to conduct discovery. (*Bowers* also clearly contemplates that any additional evidence is to be offered in the district court, thereby excluding the possibility, which under *Hackley I* is within the district court's discretion, of a "remand" to the administrative agency for further proceedings.)

[47] *But cf.,* Memorandum in Response to Petition for Rehearing, *Place* v. *Weinberger,* No. 74-116, October Term, 1974.

U.S.C. § 2000e-16(c) are not entitled to a trial *de novo* in the district court. Since the statute does not define the scope of judicial review or contain any requirement of a trial *de novo,* the scope of judicial review is that provided under the Administrative Procedure Act, *i.e.,* the administrative decision should be upheld unless 'unsupported by substantial evidence,' or 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2).

* * *

"The Government's position on the *de novo* issue is presented, e.g., in our brief in [*Swain* v. *Calloway,* 5th Cir. No. 75-2002] at pp. 32-38." Justice Department Memorandum in Response to Court Request, *Oringel* v. *Mathews,* 5th Cir. No. 74-3971 (Oct. 23, 1975).

The Department of Justice has thus recently confirmed its adherence to the second category of decisions described above, represented by the Tenth Circuit's decision in the *Salone* case. This is the position which the government has generally advocated in the lower courts, and was its position in tLe Ninth Circuit in the case at bar.[48]

E. This Court Should Adopt a Rule Providing for Plenary Judicial Proceedings in Federal Sector Cases, Because of the Express Language and Legislative History of the 1972 Amendments, As Well As Sound Policy Considerations.

Petitioner submits that the only rule which is consistent with the language, legislative history and purpose of the 1972 Title VII amendments is one which

[48] Notwithstanding the government's restatement of its position in the Fifth Circuit and the fact that said restatement was made after the grant of certiorari herein, it seems unlikely to petitioner that the government will assert this position in this Court.

provides for plenary judicial proceedings. There are a number of policy reasons why this is so, and these will presently be discussed. However, it cannot be overemphasized that, in petitioner's view, the controlling policy decision on this issue has already been made: Congress has determined that federal employees should have the same rights available in the courts as their private sector counterparts. As has been shown in Arguments I(B) and I(C), *supra,* and in *Hackley* v. *Roudebush* and *Sperling* v. *United States, supra,* to afford less than plenary judicial proceedings in federal sector Title VII cases would be to override the express will of Congress. The lower courts which have held otherwise do not even begin to explain how the plain import of the language and legislative history of the 1972 amendments can be avoided. While the Eighth, Ninth and Tenth Circuits assert that the language and legislative history are not decisive of the present issue, they offer virtually no reasoning in support of that conclusion. Petitioner believes that the contrary conclusion is inescapable.

The case at bar should not, therefore, be viewed as one in which the Court must choose between, or accommodate, conflicting policy considerations. But even if it were so viewed, a proper analysis of such considerations also compels the conclusion that federal sector Title VII actions should be conducted as plenary judicial proceedings.

1. Many of the cases declining to afford a plenary scope to federal sector civil actions proceed on the untenable assumption that no real change in the role of the judiciary was intended to be accomplished by the 1972 amendments. *Sperling* v. *United Staes, supra,*

515 F.2d at 474, 476-7. Thus the *Salone* line of cases—providing for review of the record under a "substantial evidence" test, the same standard as that enunciated in pre-Title VII adverse action cases—would limit the effect of the 1972 amendments to an explicit waiver of sovereign immunity and a removal of certain procedural problems which existed in pre-Title VII attempts to bring discrimination suits against the federal government.[49] It is plain that the 1972 amendments cannot be afforded such a narrow interpretation.[50]

While the *Hackley I, Chandler* and *Haire* cases theoretically go beyond the *Salone* approach, as a practical matter there is more similarity than difference between the two approaches. Indeed, many of the district court decisions which cite and purport to follow *Hackley I,* for example, in fact apply a "substantial evidence" test or an even less demanding standard.[51] At this writing, almost four years since the 1972 federal sector provisions became effective, there are only nine published decisions entering judgment on the merits in a plaintiff's favor against a federal defendant. In three of these a trial *de novo* was conducted; in two of the others evidence beyond the administrative record

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[49] *Compare Brown* v. *General Services Administration,* 507 F.2d 1300 (2d Cir. 1974), *cert. granted,* 421 U.S. 987 (1975), No. 74-768 *with Bowers* v. *Campbell,* 505 F.2d 1155 (9th Cir. 1974); *Penn* v. *Schlesinger,* 490 F.2d 700 (5th Cir. 1973), *rev'd on exhaustion of remedies issue,* 497 F.2d 970 (5th Cir. 1974) (en banc), *pet. for cert. pending,* No. 74-476; *Petterway* v. *V.A. Hospital,* 495 F.2d 1223 (5th Cir. 1974).

[50] With respect to the argument that the 1972 amendments' sole or primary purpose was to provide "access" to judicial review in the face of the defense of sovereign immunity, *see, Hackley* v. *Roudebush, supra,* 520 F.2d at 142, 142 n.138; *see also, Sperling* v. *United States, supra,* 515 F.2d at 476-7.

[51] *See, e.g.,* cases cited at Pet. 14 n.8.

was received; and in two of the others a finding of discrimination had been made at the administrative level.[52] Of course it is possible that in all of the numerous other cases where summary judgment has been entered in the government's favor on the basis of the administrative record, the claim of discrimination was not meritorious. A more reasonable inference, however, is that the effectiveness of the 1972 amendments has been drastically impaired by both approaches which insulate the federal government's employment practices from plenary judicial scrutiny. As a prescient district court warned in 1973:

> ". . . it is simply too easy for a federal judge operating under *Hackley* [*I*] to lapse, in his discretion, into a review of the record using the substantial evidence test or the test set forth in *Chiriaco* v. *United States* [procedural due process and absence of arbitrary or capricious agency action]. . . . Only if a trial de novo is mandatory will the federal employee be assured of the congressional intent and that is a full, impartial review of the case in an adversary context." *Jackson* v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589, 594 (S.D. Tex. 1973) (emphasis added).

2. There is another reason why anything less than a right to plenary judicial proceedings places the federal sector plaintiff at a unique and wholly unjustified disadvantage. Under the *Chandler* and *Haire* approach

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[52] Cases cited at Pet. 15 n.9; *Rogers* v. *E.E.O.C.,* 10 EPD ¶ 10,416, 11 F.E.P. Cases 337 (D.D.C. 1975) (trial *de novo*); *Smith* v. *Fletcher,* 10 EPD ¶ 10,329 (S.D. Tex. 1975) (supplemental evidence received); *Palmer* v. *Rogers,* 10 EPD ¶ 10,265 (D.D.C. 1975) (discrimination found at administrative level); *Davis* v. *Dept. of H.E.W.,* 10 EPD ¶ 10,341 (E.D. La. 1975) (discrimination found at administrative level); *Hammond* v. *Balzano,* 10 EPD ¶ 10,333 (D.D.C. 1975).

no less than under the *Salone* approach, the initial and primary focus of the district court is on the administrative record, and the plaintiff is saddled with the burden of demonstrating that it is necessary for the court to go beyond a review of that record. In such a situation—and without any prior access to discovery or compulsory process—the plaintiff is immediately placed in a defensive posture because of the existence of an administrative record compiled under the direction and control of the government. Rather than being permitted to develop his case through the normal process of discovery and present his case to the court through the normal process of a plenary trial, the plaintiff is instead required to show a persuasive justification for discovering and offering any evidence beyond the administrative record, and for presenting any live testimony to the district court as trier of fact. Yet there is simply no good reason why a federal sector Title VII plaintiff should not be able to "proceed in court like any other litigant, subject to informal steps to avoid what is shown to be an unnecessary duplication of the administrative record, rather than be required to make an affirmative showing persuading the judge that there is a 'need' before he can exercise procedures routinely accorded to civil litigants." *Hackley* v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring). And it should be re-emphasized in this connection that the procedures which are "routinely accorded to civil litigants" are fully available to plaintiffs in Title VII actions against private companies, unions, and employment agencies, as well as in Title VII actions against state, county and muncipal governments. As noted in Argument I(A), *supra,* the basic purpose of the 1972 amendments would be undermined by the manifest injustice of a double standard

which operates to the unique advantage of one particular kind of Title VII defendant.

3. The argument most frequently advanced in support of such a double standard and in favor of a more restrictive approach in federal sector cases is that it would be a waste of judicial resources to permit plenary proceedings in district court when an administrative proceeding record is available. This argument assumes that the "equivalent" of the plenary judicial proceedings which are available in all other Title VII cases may be provided in the federal sector by a review of the administrative record, as supplemented upon a showing of necessity.[53] This argument, like the assumption behind it, is faulty for a number of compelling reasons.

In the first place, it is difficult to imagine how a judicial remedy which does not include the right to conduct discovery and the right to have the court evaluate the credibility of witnesses by observing their testimony could possibly be deemed "equivalent" to the *de novo* judicial proceeding which Congress and this Court have mandated in private sector Title VII cases. The administrative procedure provided by the Civil Service Commission's regulations (5 C.F.R. §§ 713.201, *et seq.*) is certainly not equivalent to a judicial proceeding. Consideration of a few key deficiencies will highlight the obvious shortcomings of this administrative procedure. Typically, as in the case at bar, the complainant is not represented by an attorney at the administrative level; in any event, there is no provision

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[53] *E.g., Chandler* v. *Johnson, supra,* 515 F.2d at 255; *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 771-2.

for court appointment of an attorney for the complainant, or for an award of attorneys' fees if the complainant prevails.[54] The investigation which is conducted is produced under the direction of, and entirely controlled by, the agency which is the defendant in any subsequent judicial proceedings. Only if the complainant so elects is an administrative evidentiary hearing held, and even then there is no subpoena power available to the complainant, and no right to discovery comparable to that provided by the Federal Rules of Civil Procedure. And the CSC's own handbook for complaints examiners explains that "[t]he hearing is an adjunct to the investigation. *It is not an adversary proceeding but is an administrative proceeding designed to provide additional evidence.*" [55]

Beyond this, a detailed review of the administrative procedure convincingly demonstrates that the inherent bias and inadequacies which were so severely criticized prior to the 1972 amendments remain intact to this date, notwithstanding the CSC's post-Act revisions in the procedure. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 137-141 (opinion of Wright, J.), concluding after extensive analysis that "the CSC's nonadversarial fact-finding procedures and inherent structural defects persist essentially unchanged, and do not guarantee federal employees a full and fair hearing on their claims of employment discrimination. . . ." [56] *See*

[54] *Compare,* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k).

[55] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April, 1973), at p. 5.

[56] *Accord,* U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* Vol. V, "To Eliminate Employment Discrimination" (July, 1975), at pp. 61-86; Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae.

also, Hackley v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring): "the complaint hearing falls short of a Title VII action in certain of the crucial respects stressed in *Alexander* v. *Gardner-Denver* —the lack of compulsory process, except as to government employees; the dispensation with usual rules of evidence; and particularly the lack of discovery procedures. Significantly, the agency complaint hearing has been structured to avoid an 'adversary' quality. . . . And the Manual virtually instructs the Examiner in terms that equate a finding of discrimination with a situation in which there is no reasonable doubt to the contrary. [Footnote omitted.]"

But even if the administrative process were better than it is, the proper result on the issue at bar would be the same. In that sense, the empirical question of the post-1972 performance of the Civil Service Commission is simply not the issue in the case at bar. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 172 (Leventhal and Davis, JJ., concurring). For in the closely analogous case of *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), this Court squarely rejected any concept of "deferral" to the results of an arbitration process, however well-designed. In *Alexander* the respondent's proposed deferral rule [57] was rejected because:

> "[t]he rule's obvious consequence . . . would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court. . . . The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII;

[57] 415 U.S. at 55-6.

deferral to arbitral decisions would be inconsistent with that goal." 415 U.S. at 55-6.

A more stringent deferral standard was also rejected in *Alexander:*

> "Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in Rios v. Reynolds Metals Co., 467 F.2d 54 (1972). [Footnote omitted.] As respondent points out, *a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process.* And judicial enforcement of such a standard would almost require courts to make de novo determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights." 415 U.S. at 58-9 (emphasis added).

The very same reasoning applies to the CSC-devised administrative procedure in the federal sector. That procedure certainly is not an adequate substitute for plenary judicial proceedings; and to try to make it so would probably destroy its utility as a vehicle for possible informal resolution of complaints without resort to the judicial process.

4. At the same time, it has never been disputed that the administrative decisions in federal sector Title VII cases may, like arbitral decisions in private sector cases, be admitted into evidence and accorded such weight as the court deems appropriate. *Cf., Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 60. Moreover, the rest of the administrative record would also be admissible, subject only to the limitations of the Federal Rules of Civil Procedure and the Federal

Rules of Evidence. *Hackley* v. *Roudebush, supra,* 520 F.2d at 156-7; *Sperling* v. *United States, supra,* 515 F.2d at 484; *Caro* v. *Schultz, supra,* 521 F.2d at 1089. The essential point, however, is that the administrative record must not be the narrow focus of the judicial proceeding. It may be considered for whatever light it sheds on the facts at issue; but it may not be utilized as a weapon for limiting the scope of otherwise proper discovery or impairing the plaintiff's access to the normal mechanisms of judicial factfinding. *Hackley* v. *Roudebush, supra,* 520 F.2d at 151.

Nor is there any ground for believing that it is necessary or desirable to deny federal sector plaintiffs the rights available to their private sector counterparts in order to assure that these cases are efficiently conducted:

> "The informal means available to a judge to shape the course of a trial would ordinarily suffice to obviate duplication without a purpose, just as a judge routinely takes steps to avoid cumulative testimony. But that does not warrant omission of the testimony of crucial witnesses, whose demeanor is of manifest importance to the factfinding function. And the significant discovery right should not be impaired." *Hackley* v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring).

Discovery is a crucial element of any Title VII action—even of a single-plaintiff, individual case. *E.g., McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804-5 (1973); *Burns* v. *Thiokol Chemical Corp.,* 483 F.2d 300 (5th Cir. 1973). It is obviously unacceptable to place upon the federal sector plaintiff a burden to justify the invocation of this fundamental right, which is fully available as a matter of course to all other Title

VII litigants. Of course it is always open to any defendant to move for a protective order in appropriate circumstances; but it is the defendant's burden to show that such an order is necessary within the meaning of Fed.R.Civ.P. 26(c) as normally applied in Title VII cases. The mere fact that an administrative investigation has occurred provides no justification for depriving the plaintiff of the right to discovery.

Similarly, there is no warrant for assuming that the parties in a federal sector Title VII case will attempt without reason to present truly duplicative testimony, any more than the parties in any other case will seek unnecessarily to call witnesses whose live testimony would be truly duplicative of their deposition testimony. To the extent that any testimony offered is in fact unnecessarily duplicative, a district court can control it in the same way it controls testimony in any other plenary judicial proceeding. On the other hand, to the extent that testimony or cross-examination at an administrative hearing is honestly felt by a party to be inadequate, federal sector Title VII litigants should certainly have the same right to call witnesses as is enjoyed by parties in any civil litigation in which witnesses' depositions have previously been taken. It is also important to recall that even in those cases where an administrative evidentiary hearing has been held, the complainant has frequently not been represented by an attorney. Moreover,

> ". . . merely because an individual testified at the agency level does not mean that he would not be required to testify at the trial in District Court. The decision as to whether a particular witness should be called remains with counsel; although a trial judge has discretion to limit cumulative testimony, a witness' trial testimony is not cumulative merely because it repeats his testimony before the agency." *Hackley* v. *Roudebush, supra,* 520 F.2d at 158-9.

5. A frequently unarticulated [58] policy consideration behind those decisions which have denied a right to plenary judicial proceedings is the belief that federal sector Title VII cases will, unless their scope is carefully restricted, place unacceptable burdens on the judiciary. Petitioner submits that this kind of consideration is simply foreclosed by the legislative decision which Congress made in 1972 when it extended Title VII's judicial remedy to the federal sector:

> ". . . it should be remembered that the parts of the 1972 amendments involved in this case extended coverage to only approximately 2.6 million federal employees. They also extended coverage to an estimated 10.1 million state and local government employees and millions of additional private sector employees. Congress explicitly decided that the time and expense of *de novo* judicial fact-finding procedures for the latter were clearly worth the expected increase in fairness and accuracy of such fact-finding over administrative fact-finding, and the increase in respect which such decisions would be accorded. There is no indication that Congress believed that any burden created by federal employee litigation would, to the contrary, be undesirable in light of the similar laudable purposes which it serves." *Hackley* v. *Roudebush, supra,* 520 F.2d at 154 (footnotes omitted).

Accord, Sperling v. *United States, supra,* 515 F.2d at 483-4: "Those concerns, while real, are matters properly within the sphere of the legislature."

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[58] *But see, Hackley I, supra,* 360 F.Supp. at 1249 n.2 and text at n.2.

6. Finally, another argument which has sometimes been advanced as a reason for denying plenary judicial proceedings is that the savings in time afforded by a more restricted procedure would actually benefit federal sector plaintiffs because their complaints would be more expeditiously adjudicated.[59] But there is, of course, nothing to prevent the parties in a federal sector Title VII action from agreeing to submit the case for decision on the administrative record if they deem it appropriate to do so. Nor does the availability of plenary judicial proceedings in any kind of case relieve counsel of their obligation, once discovery has been conducted, to make a conscientious effort to stipulate as many facts as possible. Such an effort is always required both to simplify the court's process of decision, and to avoid burdening either the parties or the court with formal proof of facts which are clearly established by documentary or other evidence. In the final analysis, however, the response to arguments regarding the time that may be consumed in plenary judicial proceedings must be as follows:

> "Surely Congress intended that Title VII cases be expedited both in the agencies and in the courts. But more important, it wanted all vestiges of discrimination eradicated. To tell an aggrieved federal employee whose discrimination claim was rejected in an administrative proceeding that, since Congress wanted his claim expeditiously processed, he should be expeditiously denied the opportunity to present all relevant evidence pertaining to that claim is, to say the least, incongruous. Indeed, it is particularly incongruous to suggest that 'reasonable' discovery . . . is actually an evil to be avoided.
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> ". . . we simply fail to perceive what substantive policies of the Act, from the perspective of the federal employee who is aggrieved by his agency's or the CSC's treatment of his complaint, are defeated rather than advanced through a trial *de novo*. Avoidance of 'substantial delays' is no panacea if the product of speed is a hasty denial of justice. . . ." *Hackley* v. *Roudebush, supra,* 520 F.2d at 155-6 (footnote omitted).

[59] *Hackley I, supra,* 360 F.Supp. at 1252; *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 771-2.

F. The Issue in the Case at Bar Has Important Implications for Other Issues, Which Also Counsel in Favor of a Rule Providing for Plenary Judicial Proceedings.

No discussion of the issue of the nature and scope of judicial proceedings would be complete if it did not advert to other issues whose outcome will be strongly influenced if not directly controlled by this Court's decision in the case at bar. Foremost among these related issues is the question of the availability of class actions in federal sector Title VII cases.[60]

If "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant,"[61] then class actions should be fully available in federal sector Title VII cases where the requirements of Fed.R.Civ.P. 23 are met.[62] On the

[60] For a discussion of some other related issues, *see* Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae.

[61] *Sperling* v. *United States, supra,* 515 F.2d at 481.

[62] *Hackley* v. *Roudebush, supra,* 520 F.2d at 151-3 n.177; *see also, e.g., Sylvester* v. *U.S. Postal Service,* 393 F.Supp. 1334 (S.D. Tex. 1975); *Chisholm* v. *U.S. Postal Service,* 9 EPD ¶ 10,212,

other hand, if federal sector Title VII case are not *de novo* proceedings, then there are very substantial grounds for doubting that class action treatment will be available in these cases. Thus it has been held that "federal employees cannot maintain class actions under Title VII" because "a class action . . . would require exploration of factual issues obviously beyond the record of a single employee" [63]; and that "[w]here there is review on the record and no trial *de novo,* there is no class action." [64]

The class action has been the backbone of Title VII's effectiveness in the private sector.[65] Individual, single-plaintiff cases such as the case at bar [66] are, of course, important to the parties involved, and they are also affected with a public interest.[67] But the major

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11 F.E.P. Cases 457 (W.D. N.C. 1975), *appeal pending,* 4th Cir. Nos. 75-2068, 75-2069; *Ellis* v. *Naval Air Rework Facility,* 10 EPD ¶¶ 10,257, 10,422 (N.D. Cal. 1975).

[63] *Pendleton* v. *Schlesinger,* 8 EPD ¶ 9598, at p. 5569, 8 F.E.P. Cases 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929.

[64] *Spencer* v. *Schlesinger,* 374 F.Supp. 840, 844 n.6 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787; *see also, e.g., Eastland* v. *Tennessee Valley Authority,* 9 EPD ¶ 9927, at p. 6882 (N.D. Ala. 1975), *appeal pending,* 5th Cir. No. 75-1855.

[65] *E.g., Albemarle Paper Co.* v. *Moody,* 95 S.Ct. 2362 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

[66] *See also, e.g., McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

[67] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370; *see also, Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968). It should be noted that unlike in the private sector, where the EEOC and the Attorney General have authority to bring court actions to enforce Title VII—and unlike in the state and local government sector, where the Attorney General has such authority—in the federal sector, the private plaintiff is the *only* party

impact of Title VII in terms of systematic reform of unlawfully discriminatory employment practices has been felt in class action cases. In such cases, the courts have held that a single plaintiff who has exhausted his administrative remedies may maintain an across-the-board class action on behalf of other members of his class who have not exhausted or even initiated the administrative process; that such a plaintiff may raise in his judicial complaint, on his own behalf and on behalf of the class he represents, any matters "like or related to" the allegations of his administrative charge; and that other members of the class who do not themselves have independent standing may properly be named as co-plaintiffs in the action, or receive relief as unnamed parties.[68] This Court has approved this general line of authority, and has held that backpay may be awarded on a class basis in such cases.[69]

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who can bring such an action, and the government's only involvement is as a defendant.

[68] *E.g., Wetzel* v. *Liberty Mutual Ins. Co.,* 508 F.2d 239 (3rd Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975); *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543 (4th Cir. 1975); *Oatis* v. *Crown-Zellerbach Corp.,* 398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968); *Miller* v. *International Paper Co.,* 408 F.2d 283 (5th Cir. 1969); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969); *Carr* v. *Conoco Plastics, Inc.,* 423 F.2d 57 (5th Cir. 1970); *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Gamble* v. *Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975); *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969); *Oubichon* v. *North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973).

[69] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370 n.8.

These decisions have been informed by, and are consistent with the broad remedial purpose of Title VII. Their applicability to federal sector cases would be very seriously in question if this Court were to hold that such cases are not plenary judicial proceedings, but are instead intended to focus on the administrative record of the individual plaintiff's complaint. Only a ruling by this Court upholding the unitary structure of Title VII as it applies to federal defendants as well as all other defendants will preserve the vitality of the class action device in the federal sector. And on this question, as on the question presented in the case at bar, Congress has made its will known with clarity.[70]

G. The Posture of the Case at Bar Requires That the Judgment Below Be Reversed.

In the case at bar the examiner who conducted the administrative hearing on petitioner's complaint concluded that

[70] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370 n.8; Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7565 (Mar. 8, 1972), *History* at 1847: "In establishing the enforcement provisions under this subsection [706(f)(1)] and subsection 706(f) generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII . . . ."; *id.*, 118 Cong. Rec. 7564, *History* at 1844: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII"; *id.*, 118 Cong. Rec. 7566, *History* at 1851: "*Section 717(c) and (d)*—The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment."

> ". . . a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against Complainant because of her sex in not selecting her for the GS-13 Section Chief position. The evidence does not indicate that Complainant's race influenced the decision not to select her for the position." (A.R. 34-5; Pet App. 16a).

The examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (A.R. 19; Pet. App. 16a).

However, the Veterans Administration rejected the examiner's finding of discrimination, and stated that

> "The selecting official is entitled to make his selection from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on his judgment of how well the candidates will perform in the particular job being filled, and, when relative, what their potential is for future advancement. Authority: Federal Personnel Manual, Chapter 335, subchapter 3, paragraph 3.7c. The record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official, relating to his selection from the certificate of eligibles furnished him." (A.R. 38; Pet. App. 20a).

The agency's decision was affirmed by the Civil Service Commission, which added reasons of its own to those given by the agency in support of its decision. (A.R. 3-8; Pet. App. 21a-29a).[71]

[71] Two of the reasons cited by the Commission cannot be considered to suport the agency's decision.

First, the Commission observed that the person selected over

The district court's decision in the government's favor contained no discussion of the facts of the case, no indication of why it had concluded that petitioner had not been discriminated against, and no explanation of why it had decided in this particular case to limit the judicial proceedings to a review of the administrative record. (R. 252-9; Pet. App. 30a-33a). The court of appeals did state its reasons for concluding that petitioner had not been discriminated against. (515 F.2d at 254; Pet. App. 38a-39a).[72] But it, like

petitioner had a "total score on the examination (167) [which] exceeded [petitioner's] by two points." (A.R. 3; Pet. App. 22a). In fact, there was no "examination" given. A rating of applicants was performed by an evaluation panel, in order to determine which applicants were to be designated as "highly qualified." (A.R. 159). Petitioner was one of the applicants so designated. (A.R. 19; Pet. App. 4a). There was no evidence that the interview panel or the adjudication officer (the selecting official) was made aware of the actual numerical ratings assigned by the evaluation panel, and there was affirmative evidence to the contrary. (*See*, A.R. 158-9, 177, 187, 224; 94-5, 99-100). Neither the Veterans Administration nor the selecting official cited the two-point difference in ratings as a justification for failure to select petitioner. (A.R. 36-9; Pet. App. 18a-21a; A.R. 56-69, 177-186).

Second, the Commission stated that "the selectee received a more favorable rating than the complainant with respect to ability to 'motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively.' " (A.R. 6; Pet. App. 25a-26a). In fact, petitioner on two occasions received a one-point *higher* score than the selectee on this characteristic. (*Compare* A.R. 124 point 1(h) *with* A.R. 132, point 1(h); and *compare* A.R. 126, point 1(h) *with* A.R. 136, point 1(h)). The Commission seemed, inconsistently, to recognize this at a later point in its decision, where it stated that the selecting official "had previously concurred in assigning complainant a higher rating on ability to motivate employees." (A.R. 8; Pet. App. 28a).

[72] Included among these reasons was that the selectee had "a numerical score two points higher than [petitioner's] on a grading system that was not shown to have been discriminatory." (515

the district court, based its decision solely on a review of the administrative record. No testimony was heard in the district court; and petitioner was not permitted to engage in any discovery.

In the preceding portions of this argument, petitioner has set forth her reasons for believing that federal sector Title VII plaintiffs are entitled to engage in discovery pursuant to the Federal Rules of Civil Procedure, and to present testimonial and documentary evidence in a plenary judicial trial. If this argument is accepted, then a reversal of the decision below follows as a matter of course, since petitioner was deprived of the right to discovery and the right to present evidence beyond the administrative record. The summary judgment affirmed by the court of appeals cannot stand under ordinary Rule 56 standards as applied in cases where plenary judicial proceedings are afforded, because no discovery was permitted, and because even in the absence of discovery, triable issues of fact were manifest.

While a reversal follows, therefore, as a matter of law from the foregoing analysis, it is instructive to consider by way of illustration some of the more apparent defects in the review of the record which the court of appeals affirmed. A critical examination of the procedure followed at the administrative level and in the courts below reveals examples of a number of the inadequacies of any rule providing for less than plenary judicial proceedings. Beyond this, such an examination demonstrates that the judgment in respondents' favor in the case at bar does not withstand

F.2d at 254; Pet. App. 38a). As previously noted, this provides no support for a decision in respondents' favor. *See*, n.71, *supra*.

scrutiny even under a legal standard affording less than plenary judicial proceedings. Indeed, the judgment below is even unsupportable under the legal standard which the decision of the court of appeals itself set forth. That standard placed on petitioner—who had sought but been denied discovery, and who had prevailed before the only officer to hear oral testimony—the burden of demonstrating a need to present evidence beyond the administrative record. (515 F.2d at 255; Pet. App. 40a-41a). Even assuming *arguendo* the correctness of placing such a burden on petitioner, the court of appeals ignored crucial deficiencies in the administrative record in holding that there was no need for discovery and judicial evidentiary proceedings.

1. As the court of appeals recognized, there can be no dispute that petitioner established the four elements of a *prima facie* case of discrimination as set forth in this Court's decision in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973).[73] Since this showing shifted the burden to the respondents to articulate a legitimate, nondiscriminatory reason for petitioner's rejection, it is interesting to note that the agency did not call any witnesses or offer any documentary evidence at the administrative hearing, but simply rested on the investigative file which had been prepared at a prior stage in the administrative process. (A.R. 18; Pet. App. 3a; A.R. 46-7, 117). The agency's approach is perhaps understandable in light of the fact that the Civil Service Commission instructs its examiners that the concept of burden of proof does not apply to the discrimination complaint hearing

[73] *See,* 515 F.2d at 254; Pet. App. 37a: "Appellant is correct in asserting that she was entitled to an affirmative statement of nondiscriminatory reasons for the selection of another applicant."

process."[74] However, while this may explain the agency's casual attitude concerning its obligation to respond to petitioner's *prima facie* case, it also provides a striking illustration of the degree to which the administrative procedure fails to implement the order and allocation of proof to which this Court addressed itself in the *McDonnell Douglas* case.

2. Assuming *arguendo* that the respondents discharged their burden to present sufficient evidence of a "legitimate, nondiscriminatory reason" for petitioner's non-selection, petitioner was still to "be afforded a fair opportunity to show that [respondents'] stated reason for [her] rejection was in fact pretext." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802, 804. In this connection, one of petitioner's first acts after suit was filed in the district court was to notice the deposition of, and request production of documents by, the selecting official; and to notice the deposition of the person selected in preference to petitioner for the job in question. (R. 146-150). Since petitioner had represented herself at the administrative hearing, the selecting official had never been questioned by an attorney acting in her behalf. And the complaints examiner had denied petitioner's request to call as a witness at the administrative hearing the person selected for the job in question. (A.R. 118, 141, 144).

It was undisputed that petitioner was "highly qualified" for the position involved in the case at bar. Agency officials stated that it was very difficult to de-

[74] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April, 1973), at pp. 53-4; *Hackley* v. *Roudebush,* 520 F.2d 108, 138 n.129 (D.C. Cir. 1975) (opinion of Wright, J.).

cide between petitioner and the selectee, that the interview panel was divided 2-1 on the question, and that petitioner would have been selected if the ultimate selectee had not been chosen. (*E.g.*, A.R. 65-6, 95, 159-160). The attorney who represented the government in the lower courts took the position that "here we have a situation where we have two people that had outstanding records, very worthy of being considered for promotion. . . . the affidavits and the testimony in the administrative record demonstrate it is a close question [as to who should have been selected]." (Tr. 13, Dec. 21, 1973). In these circumstances, the credibility of the selecting official's testimony concerning his reasons for failing to select petitioner was of central importance. The complaints examiner—the only officer to hear and observe the selecting official's testimony—found that the selecting official had discriminated against petitioner. The Civil Service Commission, in affirming the agency's rejection of this finding, relied heavily on the selecting official's testimony. (A.R. 5-8; Pet. App. 24a-28a). It seems particularly inconsistent with the district court's role as ultimate factfinder for it to have proceeded to decision without permitting the selecting official to be questioned by petitioner's attorney, and without observing the selecting official's testimony and making an independent judgment concerning his credibility.

Similarly, the fact that the hearing officer refused to call as a witness the person selected over petitioner for the job in question makes it particularly inexplicable that the district court proceeded to decision without at least granting petitioner's request to take the selectee's disposition. Central to the issue in this case were the relative qualifications of petitioner and

the selectee, and the validity or pretextuality of the asserted reasons for failing to select petitioner. One of petitioner's contentions—on which the hearing examiner, the agency, and the Civil Service Commission each expressed no opinion because of lack of sufficient evidence (A.R. 6, 30-31, 38; Pet. App. 13a, 20a, 26a)—was that the selectee did not prossess the necessary ability to read and interpret computer printouts. In addition, petitioner contended—and, according to the agency and CSC decisions, failed to prove (A.R. 5, 37-8; Pet. App. 19a, 24a-25a)—that the selectee was inferior to her in technical proficiency. It seems incongruous that petitioner—who had already made out a *prima facie* case of discrimination—could be charged with failure to prove that the selectee was less qualified than she. Not only was it more properly the respondents' burden to show that the selectee was more qualified than petitioner; in addition, petitioner was deprived of the opportunity to take the selectee's deposition or call him as a witness, so that she was unable to inquire directly into certain aspects of his qualifications. Moreover, the inability to question the selectee hampered petitioner's opportunity to explore whether any of his contacts with his superiors might give rise to an inference that he had been "preselected" for the position in question. (*Cf.*, A.R. 62, 178).

3. As this Court held in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804-5:

> "Other evidence that may be relevant to any showing of pretext includes . . . [the defendant's] general policy and practice with respect to minority employment. [Footnote omitted.] On the latter point, statistics as to [the defendant's] employment policy and practice may be helpful to a determination of whether [the defendant's action]

> in this case conformed to a general pattern of discrimination. . . ."

In the case at bar, "review on the record" operated to impair substantially petitioner's ability to adduce the kind of evidence to which the above passage from *McDonnell Douglas* refers.

At the administrative hearing, no documentary exhibits (other than the investigative file) were offered by the parties. (A.R. 18). The hearing examiner took some initiative to obtain additional documents; but information from the personnel files so obtained was sanitized for purposes of the examiner's decision, and the actual personnel files were not available to petitioner or the district court. (A.R. 18). Of course petitioner, not being an attorney, could not have been expected to attempt at the administrative level to engage in the kind of discovery which is typical in Title VII litigation.[75] But in any case, the administrative process does not generally provide for anything comparable to discovery under the Federal Rules of Civil Procedure, and nothing comparable to such discovery occurred at the administrative level in the case at bar.

If discovery had been permitted by the district court, a number of possible avenues of inquiry would have been open. For example, detailed exploration of relevant employment statistics could have been undertaken. In this connection, it is ironic that the court of appeals, which held that there was no need to go beyond the administrative record, simultaneously held as follows:

> "Three persons, all male, were promoted from grade 12 to grade 13 during the 18 months in which

[75] *See, e.g., Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973).

> the supervisor whose decision was challenged had the principal responsibility in such promotions. There was no evidence, however, to rebut the supervisor's statement that those promoted were the best qualified. There was no evidence that qualified women even competed for these promotions, much less that any qualified woman was rejected in favor of a less qualified man." 515 F.2d at 254; Pet. App. 38a.

It seems inexplicable that the court of appeals failed to note that if petitioner had been permitted to engage in discovery, the kind of evidence which it felt was missing may well have been forthcoming. Even the Civil Service Commission considered it relevant to observe in its decision that "[s]tatistically, it is clear that as a black, and even more so as a female, complainant was in a category least likely to be promoted to a position at grade GS-9 or above." (A.R. 7; Pet. App. 27a). Discovery would have enabled petitioner, consistently with *McDonnell Douglas,* to have explored whether a general policy or practice of discrimination was lurking behind these statistics.

One starting point for such discovery might have been the analyses contained in the agency's equal employment opportunity plan, which is required by statute and regulation,[76] but which was not a part of the administrative record. Other avenues that would have been worthy of detailed exploration include (a) the circumstances surrounding a prior racial discrimination complaint involving the same selecting official, in which a clerk complained about a promotion and "[w]e were later advised to promote her" (A.R. 185); (b) the reasons why "[w]hen we hire outside, we go

[76] 42 U.S.C. § 2000e-16(b); 5 C.F.R. §§ 713.203, 713.302.

to the register and I do not recall interviewing any non-Caucasians. The minority people just aren't appearing on the register" (A.R. 185) [77]; and (c) the circumstances surrounding petitioner's allegations of a general pattern or practice of discrimination (*e.g.*, A.R. 41, 106-109, 116, 161, 163, 165, 174-5, 275-6).[78]

The foregoing is intended only to suggest some possible lines of inquiry. Moreover, it may be that evidence uncovered by discovery would not have persuaded the district court to find in petitioner's favor. The point is, however, that petitioner was deprived of the right to conduct discovery and to attempt to make an important kind of showing which this Court's opinion in *McDonnell Douglas* contemplates.

4. The hearing examiner found that petitioner had been discriminated against on the basis of her sex, but that no racial discrimination had been shown. The exclusion of certain requested witnesses at the administrative hearing would not have been of great significance had the agency accepted the examiner's decision based on sex discrimination. But since it did not, and

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[77] *See, Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362 (1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

[78] In this connection, it should be noted that it was the hearing examiner—not petitioner—who reduced the scope of the inquiry to six numbered allegations. (A.R. 20-21; Pet. App. 4a-5a). The agency and the CSC then adopted the examiner's narrow definition of petitioner's contentions. (A.R. 4-5, 36-7; Pet. App. 18a-19a, 23a-24a). A review of the record citations in the text will show that petitioner's allegations included claims of an across-the-board pattern or practice of discrimination against blacks as a class and females as a class. As noted in *McDonnell Douglas*, facts bearing on such allegations are also probative in an individual, single-plaintiff case.

since the lower court's confined themselves to a review of the administrative record, it is of central importance that the hearing examiner refused to call 15 of the 24 witnesses whom petitioner had requested. (A.R. 118, 141-5). Some of these witnesses would have testified to the existence of a pattern of race or sex discrimination within the agency, or to instances of race or sex discrimination which they themselves had suffered. (A.R. 143-5, 189-190, 191-3, 194-6, 197-9, 204-5). Some others had been requested by petitioner to show how non-minority employees were treated more favorably than blacks and females. (A.R. 143-5). The examiner's basis for excluding all of these witnesses—that "they do not appear to have direct knowledge related to [petitioner's] non-selection for the position of Section Chief" (A.R. 141; *see also,* A.R. 118)—was plainly inconsistent with the broad standard of relevancy which this Court recognized in the *McDonnell Douglas* case.

Moreover, if the kind of discovery suggested above had been permitted, it might well have led petitioner to additional witnesses beyond those whom she had attempted to call at the administrative hearing. Thus in two crucial respects—the examiner's exclusion of witnesses, and the lack of discovery and compulsory process—the procedure followed at the administrative level and in the district court was highly prejudicial to petitioner's right to "a full and fair opportunity" to adduce all competent evidence. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 805.

5. Finally, it is no reflection on petitioner, a lay person, to suggest that her examination of some of the witnesses who did testify at the administrative hearing

was not as thorough or effective as the kind of examination that an experienced attorney armed with documentary evidence might be able to conduct. (*E.g.*, A.R. 56-62, 67, 69-73). This does not, of course, necessarily mean that all or even most of the witnesses who testified at the administrative hearing would need to be recalled in plenary judicial proceedings. But petitioner was deprived of all opportunity to have her attorney examine witnesses either by deposition or at a trial. While petitioner had the right to be represented by an attorney at the administrative level if she had been prepared to bear the expense involved, there is no provision for appointment of an attorney at the administrative level, and no provision for recovery of attorneys' fees by a complainant who prevails at the administrative level and does not need to file a court action. Of course, once a civil action is filed under Title VII, appointment of an attorney, and recovery of attorneys' fees, are provided for by the statute. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k). That important aspect of the statutory scheme, however, provides little comfort if the attorney's hands are tied by a rule of law which denies the right to plenary judicial proceedings, and which rivets the attention of the parties and the court to the administrative record.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for plenary judicial proceedings.

Respectfully submitted,

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